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(2) ORIGINAL

NUMBER 85-5446

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IN THE SUPREME COURT

OF THE UNITED STATES OF AMERICA

* * * * * * * * * * * * * * * * * * *

OCTOBER TERM, 1985

* * * * * * * * * * * *

BENJAMIN A. BERRY,
PETITIONER

VERSUS

JOHN T. KING, SECRETARY OF THE LOUISIANA DEPARTMENT OF CORRECTIONS, AND, THE HONORABLE WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA
RESPONDENTS

* *

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* *

ORIGINAL APPLICATION FOR CERTIORARI ON
BEHALF OF PETITIONER, BENJAMIN A. BERRY

A DEATH PENALTY MATTER!

* * * * * * * * * * * * * * * * *

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QUESTIONS PRESENTED

(1) Did the petitioner deprived of effective assistance of counsel, in violation of the Sixth Amendment, when he was represented by a self admitted Drug Addict, on probation from the State of Florida for Felony possession of cocaine, who, without petitioner's informed consent and/or intelligent waiver, proceeded to:

a) Admit petitioner's guilt in opening argument to the jury; and,

b) During the State's case, in chief, entered into evidence the following stipulated facts in the sequence listed, to-wit:

1) That the defendant went to the Metairie Bank on the morning of 1-30-78 with the intent of committing armed robbery.

2) That after entering the Bank the defendant fired three shots, two of which struck and killed Dep.Robert Cochran.

3) That Dep.Cochran did fire one shot with service revolver which shot struck the defendant.

4) A spent pellet was removed from the defendant and if Tech. Ron Singer would testify he would testify that the pellet recovered from the defendant was fired by Dep. Cochran's service revolver.

5) That the detective recovered a spent 9mm pellet from the defendant's home in Baton Rouge and Tech. Singer would testify that this pellet was fired by the same pistol which fired the pellets recovered from Deputy Cochran's body.

(See Appendix "I", page 100 ,hereof).

Further did the foregoing stipulations amount to the Functional Equivalent of a Guilty Plea depriving petitioner of all the Constitutional rights and protections created by his plea of "Not Guilty"?

(2) Whether the failure of the trial attorney to investigate and prepare for the sentencing phase of a bifurcated capital trial violates the right to effective assistance of counsel at that critical stage of the adversary process when said inadequate investigation and preparation resulted in the inability of trial counsel to present even one witness in support of the only

plausible mitigating factor available under the circumstances, despite the existence and availability of some evidence, albeit "equivocal" or ambiguous, tending to support the notion that the victim--rather than the accused--had initiated the exchange of gunfire; and further, whether said inaction was compounded by: (a) ill-advised conduct which conveyed the impression to the jury that petitioner's own mother was unwilling to testify in order to attempt to spare thelife of her son; and, (b) a tepid and lackluster closing argument in which counsel failed to ask the jury to spare the life of petitioner and virtually destroyed his client's otherwise plausible contention that the victim had initiated the gunfire?

(3) Whether the exclusion of so-called "Witherspoon Excludables" from petitioner's petit jury violated his rights under the Sixth and Fourteenth Amendments of the United States Constitution to an impartial jury selected from a fair and representative cross section of his community at the guilt stage of his capital trial; said underrepresentation of a distinct group in society, thereby constituting a conviction prone jury.

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NO:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BENJAMIN A. BERRY

VS.

JOHN T. KING, SECRETARY OF THE
DEPARTMENT OF CORRECTIONS, ET AL

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petition of Benjamin A. Berry respectfully prays that a Writ of Certiorari issue to review the Judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on July 1, 1985, rehearing denied on August 13, 1985.

OPINION BELOW

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit, concerned herein is cited as ___ F.2d _____, unreported as of the time of filing this petition, bearing Docket No: 85-3043, appended hereto as Appendix "A", pages 27-39 hereof and the denial of rehearing thereon dated August 13, 1985 is appended hereto as Appendix "B", page 41 hereof. The Stay of the Fifth Circuit Court of Appeals mandate, dated September 5, 1985, is appended hereto as Appendix "C", page 43 hereof.

OTHER RELEVANT ACTIONS
AND OPINIONS BELOW

1) Judgment and Order of the United States District Court for the Eastern District of Louisiana dated January 2, 1985 (See Appendix "D", pages 45-46 hereof).

2) Findings and Recommendation of United States Magistrate dated October 26, 1984 (See Appendix "E", pages 48-67 , hereof).

3) Louisiana Supreme Court decision affirming Statection Application for Habeas Corpus dated 4th day of April, 1983 reported in 430 So.2d 1005 (La.1983). (See Appendix "F", pages 69-79 , hereof).

4) Decision of Louisiana Supreme Court, dated September 4, 1980 affirming petitioner's original conviction and sentence reported in 391 So.2d 406. (See Appendix "G", pages 81-96 hereof).

5) Denial of Writ of Certiorari to the Louisiana Supreme Court to review its affirmance of petitioner's original conviction and sentence. Justice Stewart would grant certiorari, reported in 451 U.S. 1010, 101 S.Ct. 2347, 68 L.Ed.2d 863 (19811). (See Appendix "H", page 91 hereof).

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was rendered on July 1, 1985. (See Appendix "A", page 27, hereof). A timely petition for rehearing was filed and was denied August 13, 1985 (See Appendix "B", page 41 hereof). The Honorable Fifth Circuit stayed its mandate until September 20, 1985 pending application to this Honorable Court for Certiorari (See Appendix "C", page 43, hereof).

The petition for certiorari to United States Court of Appeals for the Fifth Circuit is filed herein within ninety (90) days of the entry of Judgment, concerned herein, and, in order to preserve the stay of mandate, (See Appendix "C", page 43 hereof), this petition is filed on September 20, 1985.

This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1), 28 U.S.C. Sec.2101(c) and Rule 17.1(a) of the Rules of this Honorable Court.

This petition for Certiorari is filed in conformity with Rule 21 of the Rules of this Honorable Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or inthe Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

During the early morning hours of October 24, 1978, two self-admitted drug addicts, Wynn Dwyer, a layman, and Frederick A. Blanche, III, a licensed Louisiana attorney on probation from the State of Florida for possession of cocaine and marijuana, departed from Baton Rouge, Louisiana. Their destination was the Twenty-Fourth Judicial District Courthouse. Their purpose was to "defend" an American citizen, Benjamin A. Berry, charged with first degree murder, a capital offense under the laws of the State of Louisiana.

During the course of this eighty mile drive Blanche, who was in a state of panic due to his total lack of investigation and preparation, and the unavailability of a qualified plea to a lesser offense, sought the assistance of his fellow drug addict in adopting an eleventh hour trial "strategy". On the morning of October 24, 1978, Blanche, for the very first time, informed his client that he was, in fact, proceeding to trial for first degree murder and facing the death penalty. It was at this precise moment, only minutes before the commencement of his criminal trial, that Benjamin A. Berry first became confronted with the reality of the death penalty.

Petitioner, Benjamin A. Berry, had been charged by way of grand jury indictment with the first degree murder of Robert Cochran, a Jefferson Parish Sheriff's deputy, during an attempted armed robbery of the Metairie Bank and Trust Company on January 30, 1978. Petitioner, through a family member, retained Frederick A. Blanche,III, without knowledge that said attorney was suffering from a debilitating drug addiction of the most serious kind and subject to active supervised probation for serious drug related offenses in the State of Florida. The attorney's pre-trial consultation with his client was, in large part, limited to a discussion of the availability of narcotics to detainees in the Jefferson Parish Jail.

Following jury selection, trial on the merits commenced on the morning of October 25, 1978, at which time Blanche implemented the so-called "Wynn scenario", a strategy created by the aforementioned layman, on behalf of his unsuspecting client, who had previously entered a plea of "not guilty" to the charged offense. During his opening statement to the jury, Blanche, without petitioner's knowledge or informed consent, conceded his clients guilt, as well as statutory aggravating circumstances warranting the imposition of the death penalty to the jury:

> "From the beginning, we will concede to you or I will concede to you on behalf of Ben Berry that he did intend to rob a branch of the Metairie Bank. . . That because our Supreme Court has promulgated rules there will be some aggravating circumstances brought to your attention." (Docket No. 66,060, Vol. II, p. 13, emphasis added).

> "I'm not suggesting to you that [petitioner] is innocent of a crime, but I am asking you to presume at least at this point that he may be innocent of the crime of first degree murder." Id., at 17-18 (emphasis added).

Before the State completed its case, again acting without the knowledge or informed consent of his client, Mr. Blanche, stipulated into evidence the following facts:

> "Alright, ladies and gentlemen of the jury, I have before me a document which contains a stipulation to a set of fact agreed upon by the State and by the Defense Counsel. I'm going to read this to you and you're to accept these facts as having been proven, the same as if they had been proven to your satisfaction on the witness stand. You understand?... O.K. 'First, that defendant', that's the

> defendant, Berry, went to the Metairie Bank on the morning of January 30, 1978 intent of committing an armed robbery. Secondly, after entering the bank the defendant fired three shots, two of which struck and killed Deputy Robert Cochran. Thirdly, that Deputy Cochran did fire one shot with his service revolver which shot struck the defendant. And fourthly, a spent pellet was removed from the defendant and if Technician Rong Singer would testify, he would testify that the pellet recovered from the defendant was fired by Deputy Cochran's service revolver. And fifth and last, that Detective recovered a spent 9mm pellet from the defendant's home in Baton Rouge and Technician Singer would testify that pellet was fired by the same pistol which fired the pellet recovered from Deputy Cochran's body.' Now you are to accept those five statements read by me just now as facts having been proven and established in the case. Do you all understand that? ...O.K. Would you file this of record please. Make that "Stipulation 2" as title of exhibit." (See p.2, Stipulations-marked Berry Fed #1, Federal Evid. Hearing, Aug. 28, 1984), (emphasis added).

After these stipulations the State could have rested. It had enough for conviction and to warrant the imposition of the Death Penalty. After these stipulations the proceedings amounted to no more than "ceremony".

At no time prior to reading the questioned stipulations to the jury did the trial court make any effort to ascertain petitioner's informed consent to the stipulation, much less his awareness of the serious legal consequences of said stipulation. Further, the jury was not informed by defense counsel or instructed by the trial court that the order in which the stipulated facts were read did not reflect the sequence of events and such sequence must be established by the State.

Although the State could have safely rested its case after the stipulated facts were read to the jury, it proceeded to cermonially "guild the Lily". Following the presentation of the State's case Blanche called petitioner to the witness stand without adequately preparing his client to testify or advising him of the possible risks and disadvantages of testifying at the guilt-innocence phase of his bifurcated capital trial.

Petitioner took the witness stand as the only defense witness and literally became an instrument of his own destruction by attempting to refute his own stipulation. Although petitioner

testified that he had not initiated the fatal exchange of gunfire with the victim, he was unable to overcome the weight of the stipulated facts. Given these circumstances, the jury was able to rapidly return a verdict of guilty of first degree murder.

At the sentencing stage of the trial the State essentially relied upon the evidence adduced at the guilt-innocence phase of the trial; the stipulations being reread to the jury by the District Attorney.

During the sentencing phase of the trial Blanche presented absolutely no evidence as to mitigation of punishment. Although Blanche had, without hesitation, placed petitioner on the witness stand to admit his guilt, in the guilt-innocence phase, he inexplicably failed to put his client on the stand to beg for his life or express remorse in the penalty phase. Blanche's total lack of pretrial investigation left him unable to present expert medical evidence which would have tended to support his client's version of the incident; i.e., that the victim, rather than petitioner, had fired first.

It was during the sentencing phase that Blanche inexcusably called petitioner's mother as a witness and then changed his mind in the presence of the jury, electing to have her removed from the witness stand without testifying. This indecision on the part of Blanche conveyed the distinct impression to the jury that petitioner's own mother was unwilling or unable to offer evidence in mitigation, or even a plea for mercy, on behalf of her son.

After presenting no evidence at the sentencing phase, Blanche's closing argument to the jury effectively destroyed the only plausible mitigating factor otherwise available to his client; i.e., that the victim had fired the first shot. At no point during his tepid and lackluster closing argument, which could not have exceed five minutes, did Blanche even bother to ask the jury to spare the life of his client. After deliberating the jury returned a recommendation that petitioner be sentenced to death by electrocution. The trial court so sentenced petitioner in accordance with the binding jury recommendation.

The judgment of conviction and sentence of death were

affirmed by the Supreme Court of Louisiana on November 26, 1980, with rehearing being denied. State v. Berry, 391 So.2d 406 (La. 1980). Certiorari was denied by this Honorable Court on May 18, 1981. Berry v. Louisiana, 451 U.S. 1010, 101 S.Ct. 2347, (1981). Petitioner subsequently filed an application for post conviction relief in the Twenty Fourth Judicial District Court. Following an evidentiary hearing, in which evidence of Blanche's drug addiction was adduced, the trial court denied relief; said ruling being affirmed by the Supreme Court of Louisiana on May 10, 1983. State v. Berry, 430 So.2d 1005 (La. 1983).

Having exhausted all available state remedies, petitioner filed an application for writ of habeas corpus in the United State District Court for the Eastern District of Louisiana pursuant to 28 U.S.C. Sec. 2254, further moving for a stay of execution. The District Court summarily dismissed all of petitioner's claims, with the exception of the ineffective assistance of counsel claim and issued a stay of execution pending the decisions of this court in Strickland v. Washington, ____ U.S. ____, 104 S.Ct. 2052, (1984), and, Pulley v. Harris, ___ U.S. ____, 104 S.Ct. 871 (1984), Berry v. King, 576 F.Supp. 943, (ED.La. 1983). On appeal, the United States Court of Appeal remanded the cause following the decisions of this court in Strickland and Pulley. Berry v. King, 736 F.2d 1524 (5th Cir. 1984).

A federal evidentiary hearing was conducted on August 28, 1984. Evidence considered by the habeas court during the course of said evidentiary hearing, in the form of Blanche's own personal medical records revealed the staggering scope of his drug addiction over an eighteen year period.

> HISTORY OF PRESENT ILLNESS: This if the first CDU admission for this 38 year old caucasian male who admits an 18-year history of substance abuse. The patient admits having used Dilaudid, herion, Demerol, alcohol, cocaine, speed, and marijuana, as well as LSD and other hallucinogenic agents. The patient states that he used Demerol, Dilaudid and herion frequently from 1971 to 1979. Usage was parental, last usage being one year ago. Alcohol is used daily in the evenings after work. The patient states that he drinks 6-12 beers per day until he falls asleep. His last drink was the day prior to admission. He uses cocaine approximately once per month but occasional runs do occur. The patient states

that he uses both by snorting and intravenously. Last usage was one day prior to admission. The patient takes Didrex, 50 mg., three per day in the early afternoon. The last usuage was one day prior to admission. The patient states that he smokes approximately 10 joints of marijuana per day, last use being the morning prior to admission. (See medical records envelope placed in record by Magistrate).

On October 26, 1984, the Honorable Jacob J. Meyer, United States Magistrate, issued findings and recommendations which recommended dismissal of the Habeas application. Following petitioner's timely objection to said findings and recommendations, the United States District Court for the Eastern District of Louisiana, the Honorable Martin L.C. Feldman, adopted the findings and recommendation of the magistrate, and dismissed the habeas petition. A certificate of probable cause to appeal was subsequently granted, along with a stay of execution.

On July 1, 1985 the United States Court of Appeals for the Fifth Circuit affirmed the ruling of the District Court. Rehearing was denied on August 13, 1985. A stay of mandate and stay of execution was subsequently issued by the United States Court of Appeals for the Fifth Circuit, subject to the instant application for certiorari being filed in this Honorable Court on or before September 20, 1985. (See Appendices "A", "B", "C", pages 27,41,43 hereof).

REASONS FOR GRANTING WRIT

This Honorable Court should and ought to grant the Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit because:

1) The Judgment, sought to be reviewed herein, violates petitioner's right to effective assistance of counsel under the Sixth Amendment, and deprives your petitioner of his right under the Due Process Clauses of the Fifth and Fourteenth Amendments to stand upon his plea of Not Guilty, unless intelligently and voluntarily waived; and,

2) The Judgment, sought to be reviewed herein, incorrectly decided important constitutional questions contrary to the Sixth Circuit [Wiley v. Bowdens, 647 F.2d 642 (6th Cir.1981)] and the Eleventh Circuit [King v. Strickland, 748 F.2d 1462 (11th Cir.1984) cert. denied] and the Eighth Circuit [Grisby v. Mabry, 758 F.2d 226 (8th Cir. 1985)] thereby creating a conflict among the Circuits concerning more than one constitutional standard.

3) The Judgment sought to be reviewed herein, deprived your petitioner of a fair and impartial jury composed of a cross-section of the community in violation of his rights under the Sixth Amendment and the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

Otherwise, the adversarial process, called for by the Due Process Clause of the Fifth and Fourteenth Amendments will be reduced in Dignity, Force and Respect.

ARGUMENT

Petitioner, an American citizen in the custody of the State of Louisiana, and presently under the sentence of death, has raised substantial constitutional questions concerning his right to effective assistance of counsel at both the guilt-innocence and sentencing phases of his capital trial, as well as his right to trial by a fair and impartial jury chosen from a representative cross section of his community. For the sake of clarity and emphasis, each of these questions is discussed separately.

(A) Trial counsel's admission of his client's guilt, coupled with his later stipulation of certain critical facts amounting to an admission of each and every essential element of the charged offense, including evidence which established in truth, in fact, and in law, specific intent to kill, as well as evidence constituting two statutory aggravating circumstances sufficient to warrant imposition of the death penalty, amounted to the functional equivalent of a guilty plea made without his client's knowledge, and informed consent, thereby vacating his "Not Guilty Plea", and thus served to deprive petitioner of any semblence of effective assistance of Counsel, as well as depriving petitioner of all the Constitutional protections created by a "Not Guilty Plea".

Petitioner primarily contends that he was deprived of even the slightest modicum of effective assistance of counsel in the guilt-innocence phase of his capital trial due to his attorney's reliance upon a disasterous and ill-advised trial strategy in which he conceded petitioner's guilt to the jury during his opening statement and later stipulated into evidence certain crucial facts which indeed constituted an admission of each and every essential element of the charged offense of first degree murder.

Because the Fifth Circuit has disposed of this "stipulation of guilt" issue in a manner contrary to the position of the Sixth and Eleventh Circuits, the opinion of the Fifth Circuit creates a clear conflict among the circuits, while at the same time amounting to a departure from the settled jurisprudence of this court. Each of these considerations creates a compelling ground

for certiorari in this death penalty matter.

In this regard it is specifically urged that one of the stipulated facts, i.e., that petitioner fired his weapon three times, constituted an unequivocal and irrebutable admission of facts which established specific intent to kill or inflict great bodily harm. Moreover, two of the stipulated facts; i.e., that petitioner intended to commit an armed robbery, and later fired three shots, two of which struck and killed deputy Robert Cochran, amount to aggravating factors sufficient to warrant imposition of the death penalty under Louisiana Law, to-wit:

1) Engaged in the perpetration or attempted perpetration of armed robbery; and

2) Specific intent to kill or inflict great bodily harm upon a police officer;

All as provided for by L.S.A. R.S. 14:30 and La.Code of Criminal Procedure Article 905.4.

This argument, which necessarily focuses upon the actual conduct of the attorney during all phases of the capital trial, is buttressed by evidence in the form of the trial attorney's own medical records, which substantiates his drug use, abuse, and dependency during a five year period encompassing the instant capital trial. Although the attorney's documented history of drug use and abuse is not sufficient, in and of itself to give rise to a Sixth Amendment violation, it is nonetheless urged that this fact must present a grave question as to the attorney's ability to make rational and informed tactical choices under any set of circumstances.

The uncontradicted testimony of petitioner indicates that he arrived at the Twenty Fourth Judicial District Courthouse on the morning of his capital murder trial without the slightest knowledge that the state was actively seeking the death penalty against him, instead of allowing him to plead guilty to second degree murder, as consistently represented to him by his defense attorney. During the early moments of his criminal trial petitioner's attorney, without prior consultation with his client, conceded the guilt of his client to the jury by announcing that petitioner was not "innocent of a crime". (Docket no. 66,060, Vol. II, P. 13).

During the State's case in chief, petitioner's attorney, once again acting without the knowledge and informed consent of his client, entered into a binding unequivocal, and irrefutable stipulations which amounted to nothing less than an admission of guilt of each and every essential element of the charged offense of first degree murder. Once again, for the record, defense counsel stipulated in the following order:

> "Berry went to the Metairie Bank on the morning of January 30, 1978, with the intent of committing an armed robbery. . . After entering the bank the [petitioner] fired three shots, two of which struck and killed Deputy

> Cochran. . . Deputy Cochran did fire one shot with his service revolver which shot struck the [petitioner]." State v. Berry, supra. 430 So.2d at 1012.

At no time prior to accepting said stipulation in the presence of the jury did the trial judge even cursorily attempt to ascertain petitioner's acquiescence in, or informed consent to, these devastating and fatal stipulations.

Ironically, then as today, Louisiana Law expressly prevented a capital defendant from entering an unqualified guilty plea to an offense carrying the death penalty. (See, Article 557 of the Louisiana Code of Criminal Procedure, and, State v. Jett, 419 So.2d 844, (La. 1982). Apparently, petitioner's trial attorney was able to indirectly accomplish that which the law expressly prevented his client from directly accomplishing; i.e., a self-supplied judgment of conviction tantamount to suicide.

At the outset, it is worth noting that the District Court treated the "stipulation of guilt" question as harmless and nonprejudicial error due to petitioner's subsequent trial testimony, in which he purportedly ratified the substance of the stipulation and thereby unknowingly consented to the stipulation, after the fact. (See, October 26, 1984 Finding And Recommendation, Pp. 12-14). In so holding, the District Court applied a presumption of correctness to the state court determination that petitioner's trial counsel had rendered reasonably effective assistance of counsel. (Id. P. 9)[1]

The Fifth Circuit, on the other hand, apparently recognized that the claim of effective assistance of counsel presented a "mixed question of fact and law" which allowed the appellate court to substitute its own judgment for that of the district court. See, Washington v. Watkins, 655 F.2d 1346, 1351-1354, (5th Cir. 1981). After substituting what it perceived to be the correct standard of law to the facts adduced, the Fifth Circuit provided that the stipulation in question did not encompass an admission of each and every essential element of the charged offense. In this regard, the Fifth Circuit expressly stated that "the stipulation did not admit specific intent". (See, July 2, 1985 Opinion, p.8).

The question presented revolves around the affirmative duty of an attorney, charged with the responsibility of representing an American citizen on trial for his life, to render competent advice to his client concerning his personal decision whether exercise or

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[1]Petitioner did not ratify that portion of the stipulation which suggested that he had fired three shots prior to being wounded by the deputy. Petitioner testified that he spontaneously fired his weapon in the general direction fo the deputy after being struck by a shot. (Docket 66,060, Vol. III P.105). This development put petitioner in the awkward, if not ridiculous, position of taking the witness stand in order to rebut his own stipulaton, not ratifying it.

forego the various array of constitutional and procedural rights afforded by our system of justice. Resolution of this important question logically hinges upon: (1) The classification of the right involved as personal; and (2) The scope of the questioned admission as encompassing intent. Each of these vital considerations deserves separate evaluation.

1) CLASSIFICATION OF THE RIGHT INVOLVED

This Court has consistently recognized that some constitutional rights are so fundamental and essential to our ordered scheme of liberty as to be deemed constitutional rights of the first magnitude, and thus indispensable. Such fundamental constitutional rights are personal to the accused.

Fundamental constitutional rights which are deemed personal to the accused include the right to trial by jury, Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, (1930); the right to appeal, (Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, (1963); the right to (effective) assistance of counsel and the correlative right to forego the assistance of counsel, Faretta v. California, 422 U.S. 860, 95 S.Ct. 2525, (1975); and, the right to plead not guilty and thereby hold the state to its burden of proof beyond a reasonable doubt, Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, (1969). It is urged that fundamental constitutional rights are no less momentous, and basic to our system of justice simply because an accused has an attorney.

Perhaps the most significant constitutional right provided to the accused is the inalienable right to plead not guilty and hold the state to its heavy burden of proving each and every essential element of the charged offense beyond a reasonable doubt. Because the right to plead not guilty is a fundamental constitutional right of the first magnitude, and personal to the defendant, the decision as to whether to plead guilty or not guilty is reserved solely for the accused, based upon a knowing and intelligent choice. Wiley v. Bowders, 647 F.2d 642 (6th Cir. 1981). The waiver of a fundamental constitutional right which is deemed personal to the accused must reflect the knowing and informed consent of the accused, rather than the mere preference of his attorney in electing a tactical maneuver. Brownell v. Williams, 455 F.Supp. 106, (D.Maryland, 1972). In this regard, the federal courts still indulge in every reasonable presumption against the waiver of such basic rights. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, (1938).

The Chief Justice of this Honorable Court has recently observed that "such basic decisions as to whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make". Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, (1977). It should be noted that only those rights which are deemed to be less than fundamental and personal are

allocated to defense counsel and subject to waiver without the express consent of the accused. Jones v. Barnes, ___ U.S. ____ 103 S.Ct. 3308, (1983).

The record in the instant case clearly shows that petitioner entered a plea of "not guilty" to the charged crime of first degree murder, a capital offense. As such, his "plea of not guilty place[d] all of the elements of the charged crime into issue", Davis v. United States, 160 U.S. 469, 16 S.Ct. 353, (1895), thereby forcing the state to establish every element of the offense beyond a reasonable doubt. In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, (1970). At no time did petitioner attempt to modify his plea of not guilty. It is worth noting that even if petitioner had indicated his willingness to plead guilty, the trial court would have been without authority to accept said plea due to Louisiana Law expressly prohibiting an unqualified plea of guilty to a capital offense.

The inherently prejudicial impact of the stipulation cannot be lessened by the fact that petitioner subsequently took the witness stand and admitted, denied, or attempted to explain the facts upon which the stipulation was based. Because the stipulation was tantamount to an admission of guilt and confession, the voluntariness of the admission, and petitioner's informed consent thereto, must be measured by the circumstances existing at the time of the questioned stipulation -- and certainly not upon subsequent developments. This uninformed admission of guilt was not cured, or rendered less prejudicial, by subsequent developments any more than an involuntary guilty plea may be cured by an accused's later admission that he committed the underlying crime.

2) SCOPE OF THE STIPULATION

The stipulation entered into by the defense attorney constituted an absolute, unequivocal, and irrevocable admission of petitioner's guilt, thereby amounting to a guilty plea or the functional equivalent of a guilty plea. The stipulation is, for all practical purposes, indistinguishable from a guilty plea, in that a guilty plea serves "as a stipulation that no proof by the prosecution need be advanced. . . It serves as both evidence and a verdict, ending the controversy." Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969). From this it is clear that the state could have rested its case after the fatal stipulation and still obtained a judgment of conviction which would have easily withstood appellate and habeas review under the Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, (1979) standard of sufficiency of evidence.

Contrary to the reasoning of the Fifth Circuit, the questioned stipulation, at the very minimum, admitted the uncontradicted existence of certain facts from which established specific intent under Louisiana law as well as the Fifth Circuit

Rule of Garland v. Maggio, 717 F.2d 199 (5th Cir. 1983). Louisiana jurisprudence has consistently recognized that: "though intent is a question of fact it need not be proven as a fact. It may be inferred from the circumstances of the transaction." State v. Kahey, 443 So.2d 475, 494, (La.1983). In this regard the highest court of the state of Louisiana has recognized the multiple blows inflicted upon a victim may furnish a logical basis for establishing specific intent. State v. Kirkpatrick, 443 So.2d 546, (La. 1983), and, State v. Jarman, 445 So.2d 1184, (La. 1984).

Repeated and multiple gunshots have, on numerous occasions, been recognized by the Louisiana Appellate Courts to establish a factual circumstance upon which specific intent is established beyond a reasonable doubt, without any risk of reversal on the basis of a Jackson v. Virginia, supra., challenge. See, State v. Simmons, 466 So.2d 777, (La.App. 4th Cir. 1985), (fact that defendant "attempted" to shoot his victim a second time established of intent); State v. Chairs, 466 So.2d 647, (La. App. 5th Cir. 1985), (rational trier of fact obviously found that defendant fired four shots at a deputy with intent to kill or inflict great bodily harm); State v. Floyd, 458 So.2d 597, (La. App. 3 Cir. 1984), (evidence that defendant fired eleven times at a state trooper was sufficient to support finding that he had specific intent to kill the officer); State v. Coleman, 432 So.2d 323, (La. App. 1 Cir. 1983), (evidence that defendant fired several shots at occupied car was sufficient to support finding of his criminal intent); State v. Straughter, 406 So.2d 221 (La. 1981), (evidence that defendant followed his victim down the street while shooting at him was sufficient to support finding of intent); and State v. Simmons, 454 So.2d 409, (La. App. 4th Cir. 1984), (evidence that defendant shot victim three times with .38 caliber pistol was sufficient to sustain conviction).

Contrary to the reasons of the Fifth Circuit herein any premise which declares that multiple shots fired at a victim does not establish specific intent to kill or inflict great bodily harm, (beyond a reasonable doubt), is inconceivable, to a rational trier of fact or a reviewing court, absent a Plea of Insanity. See Garland v. Maggio, 717 F.2d 199 (5th Cir.1983).

In finding the defendant's argument that he fired only to frighten had no merit a Louisiana Appellate Court, (consistent with the reasoning of Garland v. Maggio, 717 F.2d 199 (5th Cir.1983) correctly stated:

> "his argument that he fired only to frighten [the victim] might have some merit. However, the defendant fired four shots at the deputy." State v. Chairs, 466 So.2d 647 (La. App. 5th Cir. 1985). (Emphasis Added).

The Fifth Circuit, in the recent case of Garland v. Maggio, 717 F.2d 199 (5th Cir. 1983), acknowledged Louisiana Law on this matter and provided that "the repetitious firing of [A] weapon" served to "demonstrate beyond any doubt whatsoever that [the killing] was neither a negligent nor reckless act." 717 F.2d at 204. The Fifth Circuit further noted that "Upon such evidence, no rational juror could have possibly concluded that the person who shot [the victim] lacked the requisite intent to kill him or inflict great bodily harm." Id.,(Emphasis Added). The Fact that multiple gunshots, at the victim, will logically equate to specific intent is the closest thing the law comes to recognizing and tolerating a conclusive presumption. In Louisiana, this premise is irrebutable, absent a plea of insanity. See, State v. Chairs, supra.

It is apparent that the Fifth Circuit was willing to resort to an unrealistic distortion of Louisiana Law, as well as common sense, in order to find that the instant stipulation did not encompass each of the essential elements of the crime, so as to render it an admission of guilt, and the functional equivalent of a guilty plea. In a rather transparent effort to distinguish the facts of the instant case from controlling cases, the court attempted to treat the questioned stipulation as something less than an absolute admission of guilt, thereby allowing it to avoid the difficulties presented by the trial court's failure to ascertain petitioner's informed consent to the actions of his attorney. This reasoning should not be allowed to distract this court's perception of the correct standard of law which is clearly applicable.

3) THE CONTROLLING LAW

The conduct of the attorney effectively deprived petitioner of his plea of not guilty and thus nullified "his right to have the issue of his guilt or innocence presented to the jury as an adversarial issue. . ." Francis v. Spraggins, 720 F.2d 1190, 1194 (11th Cir. 1983). No reported federal case authority allows an attorney to admit or stipulate to facts amounting to an admission of guilt on the part of his client without some effort by the trial court to ascertain the accused's informed consent. The instant decision of the Fifth Circuit, if allowed to stand, will deprive the adversarial process of its dignity and integrity, thus leaving unknowing defendants to the "mercy" of incompetent and constitutionally ineffective counsel. McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441 (1970).

This court has recognized that "an attorney has no power to enter a plea which is inconsistent with his client's expressed desire and thereby waive his consitutional right to plead not guilty. . ." Brookhart v. Janis, 384 U.S. 1, 86 S.Ct. 1245 (1966); "The constitutional rights of a defendant cannot be waived

under such circumstances." An attorney charged with the solemn responsibility of representing an American Citizen on trial for his life may not, under any circumstances, "override his client's desire expressed in open court to plead not guilty, and enter in the name of his client another plea -- whatever the label -- which would shut off the defendant's constitutional right to. . ." plead not guilty and hold the state to its heavy burden of proof beyond a reasonable doubt. 86 S.Ct. at 1248-1249, (emphasis added).

In Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981), the Sixth Circuit recognized that an attorney may not admit his client's guilt in open court, when such an admission would contradict his previously entered plea of not guilty, "unless the defendant unequivocally understands the consequences of the admission." Although a defense attorney "may stipulate to a particular element of a charge or to issues of proof," he "may not stipulate to facts which amount to a functional equivalent of a guilty plea."

Under the same circumstances the Eleventh Circuit found that a habeas "petitioner received ineffective assistance of counsel when his trial counsel conceded (his) guilt to murder at the guilt-innocence phase of his (bifurcated capital) trial and concentrated on a line of argument more properly directed to the penalty phase of the trial." Francis v. Spraggins, 720 F.2d 1190, 1194 (11th Cir. 1983). Where a capital defendant pleads not guilty, (the only plea allowed under Louisiana law) his "counsel, though faced with strong evidence against h'e client, may not concede the issue of guilt merely to avoid a somewhat hypocritical presentation during the sentencing phase and thereby maintain his credibility before the jury." 720 F.2d at 1194. "Although counsel at a capital trial may take steps to evoke sympathy prior to the sentencing hearing" there is no logical or tactical "reasons for conceding the defendant's guilt under the bifurcated procedure." 720 F.2d at 1195.

It is noteworthy that Wiley and Spraggins involved instances in which the attorney admitted the guilt of his client during argument to the jury; conduct which is far less egregious and prejudicial than stipulating into evidence facts amounting to an admission of guilt. Although the Fifth Circuit attempted to classify the stipulation as something less than an absolute admission of guilt, its treatment of this question must be deemed as directly contrary to the position of the Sixth and Eleventh Circuits. This obvious conflict among the circuits, along with the fact that an important constitutional question has been wrongly decided in a death penalty matter, furnishes grounds for certiorari. See, Mabry v. Johnson, ____ U.S. ___, 104 S.Ct. 2543, 2546, 81 L.Ed. 2d. 437, 442, (1984), (certiorari granted to resolve conflict among circuits).

4) THE PREJUDICE REQUIREMENT

In the recent decision of Strickland v. Washington, ___ U.S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), this Court fashioned the standard by which claims of ineffective assistance of counsel must be reviewed and evaluated. Pursuant to Strickland, the petitioner must show that his attorney failed to render "reasonable assistance," 104 S.Ct. at 2064, and that there is "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 104 S.Ct. at 2067.

Despite the prejudice requirement, Strickland nonetheless acknowledged that "an accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." 104 S.Ct. at 2063, 80 L.Ed. 2d at 692. This simply means that, at the very minimum, the accused electing to stand trial is entitled to the assistance of an attorney who adequately presents "the issue of his guilt of innocence. . . to the jury as an adversarial issue." Wiley v. Sowders, supra., 647 F.2d at 650, (emphasis added).

"The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of the case will best promote the ultimate objective that the guilty be convicted and the innocent go free." United States v. Cronic, ___ U.S. ____, 104 S.Ct. 2039, 2044, 80 L.Ed. 2d 657, 665, (1984). "The benchmark for judging any claim of ineffectiveness (of counsel) must be whether counsel's conduct so undermined the functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, supra, 104 S.Ct. at 2064, 80 L.Ed.2d at 692-693. The rationale of Strickland and Cronic is that when partisan advocacy is totally lacking, our system of justice becomes unable to produce a reliable, fair, or just result.

The conduct of the attorney in the instant case, in totally conceding his client's guilt, and thereby nullifying his plea of not guilty, without his informed consent, establishes that there was "an actual breakdown of the adversarial process during the trial of this case." United States v. Cronic, supra, 104 S.Ct. at 2046, 80 L.Ed. 2d at 667. Because the fatal stipulation amounted to the functional equivalent of a guilty plea, it deprived petitioner of an "ample opportunity to meet the case of the prosecution." Strickland v. Washington, supra, 104 S.Ct. at 2063, 80 L.Ed.2d at 692.

"The right to the effective assistance of counsel is the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronic, supra, 104 S.Ct. at 2045, 80 L.Ed.2d at 666. "If counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. . . there has been a denial of

Sixth Amendment rights that make the adversary process itself presumptively unreliable." 104 S.Ct. at 2047, 80 L.Ed. 2d at 668.

Although Strickland presumes an attorney to be competent to provide the required assistance, Cronic explains that "external constraints" may operate to destroy this presumption of competency. United States v. Cronic, supra, 104 S.Ct. at 2048, 80 L. Ed.2d at 669-670. Here, the very nature of the stipulation, coupled with the attorney's drug addiction should erode the customary presumption of attorney competency.

> (B) The failure of the trial attorney to investigate and attempt to discover and utilize the existence of plausible mitigating evidence which would have served to confirm his client's assertion that the victim initiated the fatal gunfire left him literally unable to make any coherent presentation at the penalty phase of the capital trial; with counsel's total ineffectiveness to be evidenced by a haphazard decision which conveyed to the jury the impression that petitioner's own mother was unwilling to testify on behalf of her son and a perfunctory closing argument which failed to even ask the jury to spare his client's life.

The disasterous and ill-advised tactics employed by defense counsel at the guilt-innocence phase of the trial spilled over into the sentencing phase of the bifucrated trial. Just as trial counsel had conceded his client's guilt before the jury and further stipulated to facts amounting to a functional equivalent of a guilty plea, he conceded the only plausible mitigating factor available to his client as to sentence, and failed to make the only closing argument which might have well saved the life of his client.

The defense attorney conducted absolutely no pre-trial investigation in preparation for the sentencing phase of the capital trial, and made no effort to discover or utilize potentially mitigating evidence which was readily available to him upon the slightest exertion of effort. As such, defense counsel presented absolutely no evidence at the sentencing phase.

From the very first moment petitioner first met his attorney he persistently maintained that the victim had initiated the exchange of gunfire and that he had only returned said gunfire. (Page 31 of Federal Evidentiary Hearing). Evidence supporting the proposition that the victim, rather than petitioner, had fired the first shot would have served to militate against petitioner's specific intent to kill or inflict great bodily harm, (which his attorney had already conceded and stipulated away) while serving as a viable mitigating factor to warrant a jury recommendation of life over death.

The information furnished by his client gave rise to an affirmative duty on the part of the attorney to investigate and actively seek out sources of mitigating evidence, all of which was no further away than the coroner's office. Once the attorney was

made aware of factors pertinent to either defense or mitigation, he had a duty to fully investigate and develope all available evidence and then assert the best possible defense. See, Kemp v. Leggett, 635 F.2d 453 (5th Cir. 1981); Gaines v. Hopper, 430 F. Supp. 1173 (N.D. GA 1973); and, Lee v. Hopper, 499 F.2d 456, (5th Cir. 1975).

The Strickland rule has applied the prejudice test to the claim of ineffective counsel at the sentencing stage of a capital trial. "When a defendant challenges a death sentence. . . the question is whether there is a reasonable probability that, absent the errors, the sentencer. . .would have concluded that the balance of aggravating and mitigating circumstances did not warant death." Strickland v. Washington, supra, 80 L.Ed. 2d at 698. Perhaps the best evidence of prejudice in this context is illustrated by the method in which the state established those facts upon which the jury could return a recommendation of death.

The state was able to prove petitioner's specific intent, beyond a reasonable doubt, by the stipulation of that petitioner fired three shots, at the Deputy. In addition to proving specific intent to kill or inflict great bodily harm, the order in which the stipulation was read to the jury established as a matter of fact that petitioner fired his weapon first.

The first fact stipulation was that petitioner "went to the Metairie Bank on the morning of January 30, 1978, with the intent of committing an armed robbery" (the underlying felony and aggravating circumstance). The second fact stipulated was that "after entering the bank the defendant fired three shots, two of which struck and killed Deputy Robert Cochran" (establishing specific intent beyond a reasonable doubt and a second aggravating circumstance, i.e., the killing of a police officer). The third fact stipulated was that "Deputy Cochran did fire one shot with his service revolver which shot struck the defendant." See State v. Berry, 430 So.2d 1005, 1012, (1983). This allowed jurors to accept that the events occurred in the sequence in which they were stipulated. At no point during the trial were the jurors told or instructed otherwise.

In addition to the sequence of the stipulated facts, the state attempted to prove that petitioner had fired the first shot through the direct testimony of two eyewitnesses. The testimony of James Brindle indicated that petitioner fired first upon entering the bank. (State trial transcript, pp. 47-52). The testimony of Melroy McCrossen indicates that he was unable to see who fired the first shot. (State trial transcript, pp.25-44).

More importantly, it appears that McCrossen and Brindle disagreed as to which of the four shots fired in the bank sounded completely different from the others. A review of the complete testimony of these key eyewitnesses shows that the state, in large part, established its contention that petitioner fired first by

the sound of the bullets. This evidence, in the wake of somewhat inconsistent eyewitness testimony, was hardly unshakable or insurmountable.

The testimony of Dr. Monroe Samuels, a forensic pathologist, which was adduced at petitioner's state evidentiary hearing, (see transcript of state evidentiary hearing, pp. 165, et seq.), indicated that petitioner had sustained a gunshot wound to his left arm and abdomen. No evidence suggested that petitioner's wound could have prevented him from firing his weapon. It was the expert opinion of Dr. Samuels that the bullet which struck petitioner had been fired "from a horizontal position" by "an individual. . .standing straight up." (See, transcript of state evidentiary hearing, p. 168).

In addition, Dr. Samuels testified that Deputy Robert Cochran had been struck by two bullets, one of which was incapacitating, and one of which was fatal. (Transcript of state evidentiary hearing, p. 170). The non-fatal bullet, which was fired first, entered the body of the victim "beneath the right shoulder" and passed through the "bone in the upper (right arm)," (transcript of the state evidentiary hearing, p.170). This evidence strongly suggests, if not establishes, that Deputy Cochran could not have discharged his weapon after being struck by either of the bullets fired by petitioner, thus creating a strong premise that the deputy fired first.

The aforementioned evidence, which at the very minimum, tended to substantiate petitioner's version of the incident that the victim had fired first, when coupled with evidence of petitioner's veracity, could have made a difference in the sentence ultimately recommended by the jury. In this regard, the testimony of Mrs. Carol B. Wunderlich, who was not interviewed or utilized by defense counsel would have conveyed the message that petitioner was "a trusted friend and employer of the family." (Transcript of state evidentiary hearing, p. 130).

Such evidence, while not especially significant when viewed standing alone, assumes added significance in view of the testimony of Dr. Samuels, as the combined weight of this testimony related to the credibility of petitioner. It must be remembered that petitioner had persistently told his attorney, as he would later tell the jury, that he had not fired the first shot. The testimony of Dr. Samuels' would have added credence to petitioner's version of the incident. The additional testimony of Mrs. Wunderlich would have further established petitioner's credibility. The combined weight of this testimony could have overcome the rather weak testimony of eyewitnesses concerning the sequence of the gunshots.

Counsel's ineffectiveness did not end with his failure to develop solid mitigating evidence. The total failure of the attorney to utilize such available evidence to attempt to save the

life of his client was further compounded by his calling petitioner's mother to the witness stand, and then changing his mind in the presence of the jury and having her removed. This inexcusable conduct, which was the direct result of a complete lack of trial preparation, created the distinct impression upon the jury that petitioner's own mother was either unwilling or unable to offer any evidence of mitigation, or even a plea for mercy, on behalf of her son.

Finally, trial counsel's total ignorance of facts supporting a plausible mitigating factor caused him to temper his closing argument to the jury. During his closing argument to the jury, which could not have exceeded five minutes, the attorney offered the following version of the incident to the jury: "I think that Ben went there, he went there to rob a bank. He came confronted with a deputy. He saw the gun in Ben's hand and they fired. They exchanged fire, those first two shots." (See, transcript of sentencing hearing, p.19). As such, the attorney reaffirmed its earlier stipulation and effectively destroyed, for the second time, the existence of the only mitigating factor otherwise available to his client; that the victim, rather than petitioner, had initiated the exchange of gunfire.

Moreover, the attorneys closing argument failed to specifically ask the jury to spare the life of his client. Counsel's closing argument merely suggested that there was "some little good" in petitioner and thus asked the jury to "consider compassion". (See, transcript of sentencing hearing, pp. 15-19). Such compassion was obviously short of mercy.

All of the aforestated facts point to the inescapable conclusion that petitioner was totally deprived of any formal presentation at the sentencing stage of the capital trial whatsoever. Despite the failure of the defense attorney to present any mitigation evidence whatsoever, the Fifth Circuit presumed the attorney competent and tersely classified the evidence in possession of Dr. Samuels as "equivocal." (See Appendix "A", page 35 hereof). Once again, the Fifth Circuit has misread Strickland, apparently construing the case to stand for the proposition that no defense is presumptively better than some defense, a proposition unacceptable to the Eleventh Circuit.

Strickland only requires petitioner to show a reasonable probability that, with the effective assistance of counsel at sentencing, the sentencer "would have concluded that the balance of aggravating and mitigating factors did not warrant death." Strickland v. Washington, supra, 104 S.Ct. at 2069. Of course, the Strickland case involved a Florida death penalty case in which the trial judge, rather than a jury, imposed a death sentence without benefit of a jury recommendation as to sentence.

The prejudice test applied in the Strickland case was whether competent assistance would have changed the thought process of one

person, i.e., the sentencing judge. The prejudice test to be applied in the instant case is whether competent legal representation and the full presentation of relevant mitigating evidence would have changed the thought process of one of the twelve jurors. Under Louisiana law, unlike Florida law, the jury recommendation is binding and therefore determinative of the sentence imposed by the court. Even more importantly, the failure of even one juror to concur in a unanimous recommendation of a death sentence requires the trial court to automatically impose a sentence of life imprisonment.

Under these circumstances, even the slightest doubt, although premised upon "equivocal" evidence, might have indeed saved petitioner's life.

The instant case is further distinguishable from Strickland. In Strickland the attorney made a choice to present evidence of the client's remorse to a sentencing judge whom he perceived to be receptive to such a presentation. As such, the attorney made a tactical choice to present one line of defense over what he believed to be another less plausible line of defense. The attorney in Strickland attempted to humanize his client by emphasizing his remorse and acceptance of his responsibility.

To the contrary, the attorney in the instant case did absolutely nothing. As per the recent decision of the Eleventh Circuit in King v. Strickland, 748 F.2d 1462 (11th Cir. 1984), cert. denied, (Mem. No. 84-1231) (April 15, 1984), the facts of the instant case are completely distinguishable from Strickland v. Washington, supra.

> "Nevertheless, we conclude that King's attorney's failure to present available character witnesses in mitigation and his weak closing argument constituted both an unreasonable professional performance by the attorney and impermissible prejudice to King, thereby denying him effective assistance of counsel at the penalty stage of the trial." King v. Strickland, supra 748 F.2d at 1463-1464. CERT. DENIED.

The lower federal courts have, since Strickland, observed the increasing difficulty of assessing prejudice in the context of a capital sentencing hearing when, as here, absolutely no evidence is presented. See, Milton v. Procunier, 744 F.2d 1091, (5th Cir. 1984), (Tate, J., concurring).

Because the conduct of the questioned attorney at the sentencing phase of the bifurcated trial actually deprived petitioner of any meaningful hearing as to sentence, it cannot be said that the appropriate constitutional standards were employed to guide jury discretion, thus creating a substantial possibility of arbitrary and excessive punishment. As such, the instant death penalty must be set aside.

C) The exclusion of so-called "Witherspoon Excludables" from petitioner's petit jury served to violate his Sixth Amendment right to a fair and impartial jury chosen from a representative cross section of the community.

During the first day of petitioner's capital trial all potential jurors were death qualified as per Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, (1968). Certain prospective jurors were excluded from jury service solely because they expressed scruples against imposition of the death penalty. It is urged that the exclusion of these jurors in the guilt-innocence phase of petitioner's bifurcated trial deprived him of a fair and impartial jury composed of a representative cross section of the community, thereby violating his rights under the Sixth Amendment of the United States Constitution.

In Witherspoon v. Illinois, supra, the United States Supreme Court determined that those prospective jurors who indicate "that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them," 391 U.S. at 514, may be excluded from jury service in the trial of capital cases. The Witherspoon decision specifically left open the question as to whether the exclusion of so-called "Witherspoon Excludables" from the guilt-innocence phase of a capital trial might violate the Sixth Amendment rights of the accused. 391 U.S. at 517-518.

Since Witherspoon, the Eighth Circuit has determined, without qualification, that death qualified jurors are more conviction-prone than an ordinary jury from which "death scrupled" jurors are not systematically excluded. "The underrepresentation of a distinct group from a petit jury brought about by systematic challenge for cause affects the integrity of the entire jury system, and no actual prejudice need be shown." (Grigsby v. Mabry, 758 F.2d 226 (8th Cir.1985).

The Fifth Circuit correctly concluded that the grant of certiorari in Grigsby v. Mabry, creates special circumstances which cannot be ignored in connection with this matter. As noted by the Fifth Circuit, petitioner does have cause for complaint in that a juror was excused for cause.[2]

Petitioner is entitled to have the rule of Grigsby applied to this case following ultimate disposition of the cert. petition presently pending.

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[2] "We reject the State's suggestion that the juror challenged for cause was within reach of a peremptory challenge, and therefore Berry may not complain of his exclusion. Contrary to the State's representation in its brief, the Louisiana Supreme Court found that the State had used its quota of peremptory challenges at Berry's trial, and found 'therefore...defendant would have cause for complaint if the state had been erroneously allowed a challenge for cause.'" State v. Berry, 391 So.2d 406 at 410. (See Appendix "A", page 10 hereof).

CONCLUSION

It has been observed that the quality of a civilization may be measured by the manner in which a society administers its system of justice. Given the truthfulness of this proposition, the tragic facts of the instant case say little for the quality of our civilization.

This case involves a fundamental principle lying at the core of our free society; the right of a citizen to be heard, with the assistance of counsel, prior to being condemned. Here, a citizen charged with a serious crime has been afforded a cermonial trial with none of the traditional characteristics of an adversary proceeding, in which his attorney literally stipulated him into the electric chair. Petitioner for all practical purposes does not seek a new trial; he merely seeks the trial which he was never afforded in the first place.

It is urged that the facts present, which are sufficient to shock the conscience of a civilized system, should prompt some degree of judicial indignation. Thus far, throughout the tormented history of this case, through the state and federal juridicary, no court has evidenced the slightest modicum of concern, much less indignation.

The right which our system affords an accused to a fair trial with the effective assistance of counsel somehow implies the right of an accused not to be represented by a criminal and drug addict. In view of the nature of the proceedings at the trial court level and the conduct of defense counsel, petitioner's execution under such circumstances can amount to nothing more than the shamful and unprincipled extermination of human life.

Wherefore, petitioner, Benjamin A. Berry, respectfully requests that this Honorable Court issue a writ of certiorari to review the July 1, 1985 order of the United States Court of Appeals for the Fifth Circuit; and that after due proceedings this court issue a decree reversing said order of the Court of Appeal for the Fifth Circuit, and further remand said cause with instructions that a writ of habeas corpus issue herein.

Respectfully Submitted.

SAMUEL S. DALTON, ATTORNEY FOR
PETITIONER, BENJAMIN A. BERRY
2001 Jefferson Hwy.
Jefferson, La. 70121
(504) 835-4289

APPENDIX "A"

JUDGMENT AND OPINION OF
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
(CONSISTING OF 14 PAGES NUMBERED
27 THRU 39).

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 85-3043

D. C. Docket No. CA-83-5259-F

BENJAMIN A. BERRY,

Petitioner-Appellant,

versus

JOHN T. KING, Secretary of Department of Corrections, etc., ET AL.,

Respondents-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

Before RUBIN, JOLLY, and DAVIS, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed. The stay of execution is continued for fifteen days from this date to permit Appellant to apply for certiorari and a further stay. The mandate shall issue forthwith.

July 1, 1985

ISSUED AS MANDATE: July 1, 1985

REISSUED AS MANDATE:

27

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85-3043

BENJAMIN A. BERRY,

Petitioner-Appellant,

VERSUS

JOHN T. KING, Secretary of Department of Corrections, Etc., ET AL.,

Respondents-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

---

(July 1, 1985)

Before RUBIN, JOLLY and DAVIS, Circuit Judges.

DAVIS, Circuit Judge:

This appeal from a denial of a petition for habeas corpus raises two issues: (1) whether Benjamin Berry was denied effective assistance of counsel in his state capital murder trial; and (2) whether this circuit should reconsider its position that excluding from the guilt phase of a capital case jurors who are absolutely opposed to the death penalty does not

violate the constitutional rights of the defendant in light of the Eighth Circuit's decision in Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985), petition for cert. filed sub nom Lockhart v. McCree, 53 USLW 3870 (U.S. May 29, 1985)(No. 84-1865). We affirm the denial of the petition, but leave in effect the stay of execution for fifteen days in order to permit Berry to apply for certiorari.

I. FACTUAL AND PROCEDURAL BACKGROUND

On January 30, 1978, Benjamin Berry and David Pennington drove from Baton Rouge to Metairie with the intention of robbing the Metairie Bank and Trust Company. Berry entered the bank and drew a nine millimeter automatic pistol. There was an exchange of gunfire between Berry and Cochran, a Jefferson Parish deputy sheriff working as a guard in the bank, in which Berry fired three shots and Cochran fired one shot. Cochran's shot struck Berry in the lower left chest; two of Berry's shots struck Cochran in the shoulder and the neck, resulting in Cochran's death. Berry and Pennington fled the scene and returned to Baton Rouge, where both were arrested.

Berry was indicted for first-degree murder, and retained Frederick A. Blanche, III as counsel for his trial. The state's evidence identifying Berry as the individual who committed the attempted armed robbery and shooting was overwhelming. At trial,

Blanche conceded in his opening statement that Berry intended to rob the bank in Metairie. In addition, Blanche stipulated to the following facts: (1) that Berry went to the bank intending to commit an armed robbery; (2) after entering the bank Berry fired three shots, two of which struck and killed Cochran; (3) Cochran fired a single shot which struck Berry; and (4) the bullets which were found in Cochran and Berry each came from the other's gun. The guilt phase of the trial proceeded with the state calling various witnesses to the crime, attempting to establish that Berry fired the first shot in the bank. Berry's defense in the guilt phase was that he did not possess the specific intent necessary for a first degree murder conviction under the Louisiana statute. Berry was the only witness in his behalf, and his testimony essentially corroborated the facts in the stipulation. He denied that he fired the first shot, contending that he did not intend to shoot Cochran, but did so only as a self-defense reflex.

The jury found Berry guilty, and the sentencing phase proceeded. During this phase, Blanche introduced no witnesses or evidence on Berry's behalf. Berry's mother was called to testify, but was apparently overcome by emotion and ultimately was not placed on the stand. Berry was sentenced to death.

Berry's conviction was affirmed on appeal, and the United States Supreme Court denied certiorari. Berry then filed a state

habeas corpus petition, which was denied after an evidentiary hearing. The primary charge made in the state habeas petition is the same as that made in this federal petition - that Berry was denied effective assistance of counsel because Blanche was addicted to illegal drugs at the time of the trial. A number of witnesses testified in the state evidentiary hearing, including Blanche himself, the state judge who presided over Berry's trial, David Pennington's attorney, and various associates of Blanche. The testimony of Blanche's associates was that he had, at times in the past, had problems with drugs. The state judge and others who were present at Berry's trial testified that he did a good job in a difficult case. The denial of the state habeas petition was affirmed by the Louisiana Supreme Court. State v. Berry, 430 So.2d 1005 (La. 1983).

Berry then filed this federal habeas corpus petition under 28 U.S.C. § 2254 in the district court for the Eastern District of Louisiana. The district court dismissed all of Berry's claims save that of ineffective assistance of counsel, and granted a stay of execution pending the outcome of Strickland v. Washington, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) and Pulley v. Harris, 104 S.Ct. 871 (1984), which were then pending before the Supreme Court. Berry appealed this ruling and this court remanded after the decisions in Strickland and Pulley v. Harris were issued.

In August 1984 an evidentiary hearing was held before a magistrate. At this hearing, the testimony again was largely directed to Blanche's involvement with drugs. The magistrate recommended that Berry's petition be dismissed, and his findings and recommendations were adopted by the district court.

Berry noticed eight separate grounds for appeal from the district court's dismissal; of these only his claims concerning ineffective assistance of counsel and a claim based on the Eighth Circuit's decision in Grigsby v. Mabry have been pressed in this appeal.

II. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

In evaluating whether a conviction must be reversed for ineffective assistance of counsel, we utilize the two-part test set forth by the Supreme Court in Strickland v. Washington:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

80 L.Ed.2d at 693.

In evaluating the first prong of the Strickland test, whether counsel's professional conduct falls short of the standard, Strickland teaches us that:

> Judicial scrutiny of counsel's performance must be highly differential . . . Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id. at 694-95.

The prejudice required by the second prong of the Strickland test is something considerably more than the possibility that an unreasonable error by counsel might have had some effect on the trial. As the Supreme Court stated in Strickland: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 698. A "reasonable probability" is defined as a probability sufficient to undermine confidence in the outcome of the case. Id.

Berry's contentions of ineffective assistance essentially fall into two closely related categories. First, Berry contends that as a result of his alleged drug addiction Blanche failed to adequately investigate and prepare for the defense of his case.

This lack of investigation and preparation allegedly caused Blanche to fail to locate witnesses who could have supplied exculpatory information in the guilt phase and mitigating testimony in the penalty phase. Second, Berry contends that Blanche's drug use, plus his failure to investigate, prevented him making any sort of organized presentation during the guilt and sentencing phases of the trial. Berry contends that in the guilt phase this caused Blanche to stipulate to the "functional equivalent of a plea of guilty" without Berry's consent. He further contends that during the sentencing phase Blanche was unable to make more than a "tepid" plea for his client's life.

We first note that the question whether Blanche in fact used drugs during Berry's trial was far from settled in either the state or the federal evidentiary hearings. In any case, under Strickland the fact that an attorney used drugs is not, in and of itself, relevant to an ineffective assistance claim. The critical inquiry is whether, for whatever reason, counsel's performance was deficient and whether that deficiency prejudiced the defendant. We therefore concentrate on Berry's specific allegations of deficient performance and prejudice.

In Strickland, the Supreme Court noted that "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Id. at 699. The majority of Berry's

ineffective assistance claims are best disposed of in this fashion. Although Berry contends that Blanche's failure to investigate led him to miss medical and ballistic evidence which would have raised a reasonable doubt concerning who fired the first shot in the bank, and thus a reasonable doubt as to Berry's intent, the only evidence Berry has specifically identified is the testimony of Dr. Monroe Samuels. Dr. Samuels is a forensic pathologist who testified at the state evidentiary hearing. Having examined Dr. Samuels' testimony, we find it to be at best equivocal, and certainly not sufficient to undermine confidence in the outcome of the trial. Since Berry has not pointed to any other evidence which would have been produced by more thorough investigation, we conclude that even if his counsel failed to investigate and that failure was unreasonable, no prejudice has been demonstrated.

Berry's contention that Blanche stipulated to the functional equivalent of a plea of guilty without his consent has more substance. If Berry's characterization of this stipulation were accurate, this allegation would require more analysis. It is clear, however, that the stipulation did not admit every element of guilt. The stipulation did not admit specific intent; the lack of specific intent, a necessary element under La. Rev. Stat. 14:30, was the defense which Blanche presented in the guilt phase. Thus, this stipulation was a concession of facts which

Blanche apparently concluded the state could easily establish and that no advantage would inure to Berry if live witnesses recounted these unfavorable facts for the jury. Berry has also failed to identify any prejudice which resulted from the stipulation. His sole contention is that Blanche failed to subject the prosecution's case to meaningful adversarial testing, and "effectively relieved the state of its burden of proving each and every essential element of first degree murder beyond a reasonable doubt and further deprived petitioner of the opportunity to reap the benefits of any trial error which otherwise [would have] developed as a result of the state being forced to present its evidence." This argument is not convincing. "An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification' and the like. A defendant has no entitlement to the luck of a lawless decision maker, even if a lawless decision cannot be reviewed." Strickland, 80 L.Ed.2d at 698. It is also true that a defendant is not entitled to the luck of an inept adversary. We therefore conclude that Berry has not identified any prejudice resulting from the stipulation.

For the reasons outlined above, we also find that Berry has demonstrated no prejudice in the sentencing phase from any failure to investigate by Blanche. The only specific mitigating

evidence Berry cites which might have been uncovered by a more thorough investigation is the testimony of Dr. Samuels, which Berry again argues might have swayed the jury in his favor.

Berry's assertion that Blanche first called his mother as a witness, but then decided not to place her on the stand, thus giving the jury the impression that his own mother would not testify in his behalf, is unconvincing. It appears from the record that Mrs. Berry was overcome with emotion and thus unable to testify. Blanche then placed her on the front row of the courtroom, in full view of the jury. This was a reasonable and strategic response to this situation. Finally, we have examined Blanche's closing argument and find it to be within the range of professional competence which is required.

III. THE EFFECT OF GRIGSBY V. MABRY

The Supreme Court decided in Witherspoon v. Illinois, 391 U.S. 510 (1968), that those individuals in the jury venire who indicate "that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them," 391 U.S. at 514, may be excluded from juries in the trial of the penalty phase in capital cases. Witherspoon left open the question whether the exclusion of so-called "Witherspoon excludables" from the guilt phase of the trial of a capital case might violate the rights of the defendant. 391 U.S. at 517-18, 520 n. 18. Since Witherspoon, however, decisions

of this circuit have established as a matter of law that exclusion of jurors authorized by Witherspoon from the guilt phase of the trial does not violate the sixth amendment right to have a jury selected from a representative cross section of the community or the fourteenth amendment due process right to an impartial jury.[1] The Eighth Circuit recently reached a different conclusion in Grigsby v. Mabry and found that the exclusion of Witherspoon excludables from the guilt phase of the trial violates the sixth amendment. From an examination of the jury voir dire, it appears that one juror was challenged on Witherspoon grounds at Berry's trial.[2] Berry therefore asks that we take judicial notice of the underlying factual findings in Grigsby v. Mabry, and hold that this exclusion violated his Sixth Amendment rights.

---

[1]See Matthesson v. King, 751 F.2d 1432, 1442 (5th Cir. 1985); Knighton v. Maggio, 740 F.2d 1344, 1350 (5th Cir.) cert. denied, 83 L.Ed.2d 241 (1984); Moore v. Maggio, 740 F.2d 308, 321 (5th Cir. 1984); Sonnier v. Maggio, 720 F.2d 401, 407-08 (5th Cir. 1983) cert. denied, 79 L.Ed.2d 726 (1984); Smith v. Balkcom, 660 F.2d 573, 575-84 (5th Cir. 1981), modified on other grounds, 671 F.2d 858 (5th Cir.) cert. denied, 459 U.S. 882 (1982); Spinkellink v. Wainwright, 578 F.2d 582, 583-96 (5th Cir. 1978) cert. denied, 440 U.S. 976 (1979).

[2]We reject the State's suggestion that the juror challenged for cause was within reach of a peremptory challenge, and therefore Berry may not complain of his exclusion. Contrary to the State's representation in its brief, the Louisiana Supreme Court found that the State had used its quota of peremptory challenges at Berry's trial, and found "therefore . . . defendant would have cause for complaint if the state had been erroneously allowed a challenge for cause." 391 So.2d at 410.

We are informed that a petition for certiorari has been filed in the Grigsby case. The Eighth Circuit's decision in Grigsby may not be ignored. We therefore, although affirming the denial of Berry's habeas petition, leave in effect the stay of execution for fifteen days in order to permit Berry to apply for certiorari and a further stay.

AFFIRMED.

APPENDIX "B"
DENIAL OF REHEARING
DATED AUGUST 13, 1985
(CONSISTING OF 1 PAGE
NUMBERED 41)

APPENDIX "B"

IN THE U ITED STATES COURT OF APPE

FOR THE FIFTH IRCUIT

U.S. COURT OF APPEALS
FILED
AUG 13 1985
GILBERT F. GANUCHEAU
CLERK

No. 85-3043

BENJAMIN A. BERRY,

Petitioner-Appellant,

versus

JOHN T. KING, Secretary of Department of Corrections, Etc., ET AL.,

Respondents-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

---

ON PETITION FOR REHEARING

(August 13, 1985)

Before RUBIN, JOLLY and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

W Eugene Davis
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

[redacted]

REHG-4

41

APPENDIX "C"

STAY OF COURT OF APPEALS' MANDATE

(CONSISTING OF 1 PAGE

NUMBERED 43)

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
SEP 20 1985
GILBERT F. GANUCHEAU
CLERK

No. 85 3043

BENJAMIN A. BERRY,

Petitioner-Appellant.

versus

JOHN T. KING, Secretary
of Department of Corrections,
Etc., ET AL.,

Respondents-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana

BEFORE RUBIN, JOLLY and DAVIS, Circuit Judges.

BY THE COURT:

☐ The motion of _____
for ☐ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

☑ The motion of appellant
for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including Sept. 20, 1985 ONLY, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

☐ The motion of _____
for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

☐ The motion of _____
for a further stay of the issuance of the mandate is DENIED.

[redacted]

NDT-4

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APPENDIX "D"

JUDGMENT AND ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
DATED JANUARY 2, 1985
(CONSISTING OF 2 PAGES
NUMBERED 45 AND 46)

(2)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA.
JAN 24 2 28 PM '85
LORETTA G. WHYTE
CLERK

BENJAMIN A. BERRY	*	CIVIL ACTION
VERSUS	*	NO. 83-5259
JOHN T. KING, SECRETARY OF THE DEPARTMENT OF CORRECTIONS, STATE OF LOUISIANA and ROSS MAGGIO, WARDEN, STATE PENITENTIARY, ANGOLA, LOUISIANA	*	SECTION "F" * * * * * * * * * * * * A DEATH PENALTY CASE * * * * * * * * * * * *

JUDGMENT

For the written reasons of the Court on file here, accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, John T. King, Secretary of the Department of Corrections, State of Louisiana, and Ross Maggio, Warden, State Penitentiary, Angola, Louisiana and against petitioner, Benjamin A. Berry dismissing petitioner's writ of habeas corpus.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the stay of execution entered by this Court on October 27, 1983, be and it is hereby RESCINDED.

New Orleans, Louisiana, this 2d day of January, 1985.

CLERK'S OFFICE
A TRUE COPY
JAN 3 1985
[illegible]
Deputy Clerk

MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

[redacted]

DATE JAN 3 1985

6 45 (8) 52

(3)

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
JAN 2 11 12 AM '85
LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

BENJAMIN A. BERRY	*	CIVIL ACTION
VERSUS	*	NO. 83-5259
JOHN T. KING, SECRETARY OF THE DEPARTMENT OF CORRECTIONS, STATE OF LOUISIANA and ROSS MAGGIO, WARDEN, STATE PENITENTIARY, ANGOLA, LOUISIANA	*	SECTION "F" * * * * * * * * * * * * A DEATH PENALTY CASE * * * * * * * * * * * *

ORDER

The Court, after considering the petition, the entire record and transcript of all the proceedings, the applicable law and the Findings and Recommendations of the Magistrate, and after carefully considering and analyzing petitioner's Objections to the Magistrate's Findings and Recommendations, hereby adopts the Magistrate's Findings and Recommendations as its own.

Accordingly,

IT IS ORDERED that the petition of Benjamin A. Berry in the captioned action for the issuance of a writ of habeas corpus is hereby DISMISSED.

IT IS FURTHER ORDERED that the stay of execution entered by this Court on October 27, 1983 be and it is hereby RESCINDED.

New Orleans, Louisiana, January 2, 1985.

MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

JAN 2 1985

DATE OF ENTRY

7
46

(8)

APPENDIX "E"

FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE DATED OCTOBER 26, 1984

(CONSISTING OF 20 PAGES NUMBERED 48 THRU 67)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA.
OCT 23 PM 2:24
LORETTA G. WHYTE

BENJAMIN A. BERRY

VERSUS

JOHN T. KING, SECRETARY OF
THE DEPARTMENT OF CORRECTIONS,
STATE OF LOUISIANA

AND

ROSS MAGGIO, WARDEN, STATE
PENITENTIARY, ANGOLA, LOUISIANA

CIVIL ACTION
NO. 83-5259
SECTION: "F" (3)

****

A DEATH PENALTY CASE

****

FINDINGS AND RECOMMENDATION

I. PROCEDURAL BACKGROUND

Petitioner, Benjamin A. Berry, was tried and convicted of first degree murder before the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana. After the guilty verdict was pronounced, the sentencing phase of the trial was held before the same jury that convicted Berry. The jury sentenced Berry to death.

An application for a new trial was denied. Thereafter, petitioner's sentence and conviction were automatically reviewed and affirmed by the Louisiana Supreme Court. State v. Berry, 391 So. 2d 406 (La. 1980).

Petitioner then sought a writ of certiorari to the United States Supreme Court. The application was denied. Berry v. Louisiana, 451 U.S. 1010, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981).

At this point, petitioner's original trial counsel, Frederick A. Blanche, III, withdrew from the case. Samuel A. Dalton was enrolled as Berry's new counsel.

With new counsel, petitioner sought postconviction habeas corpus relief before the Twenty-Fourth Judicial District Court for the Parish of Jefferson where the crime was committed. The state habeas proceeding was not held before the trial judge, but before Judge Thomas E. Wicker.

DATE OF ENTRY OCT 29 1984

After an evidentiary hearing, Judge Wicker rendered written reasons denying petitioner's application. The Louisiana Supreme Court affirmed the State court's denial of Berry's habeas application. State v. Berry, 430 So. 2d 1005 (La. 1983).

Petitioner moved his case into this federal forum seeking habeas corpus relief pursuant to 28 U.S.C. §2254. Petitioner also moved for a Certificate of Probable Cause to stay his execution on the ground that the method of proportionality review he received was erroneously limited to Jefferson Parish and instead should have been based on a statewide review. Judge Martin L. C. Feldman of the district court dismissed as frivolous all of petitioner's previously exhausted claims with the exception of the claim of ineffective assistance of counsel. Berry v. King, No. 83-5259 (E.D. La. Nov. 28, 1983). However, Judge Feldman granted a stay of execution pending final decision in two important cases. Id. The issue of what constitutes effective assistance of counsel was before the United States Supreme Court in Washington v. Strickland, cert. granted, ___ U.S ____, 103 S.Ct. 2451, 77 L.Ed.2d 1332 (1983). The Supreme Court also had before it the case of Pulley v. Harris, cert. granted, ___U.S. ___, 103 S.Ct. 1425, 75 L.Ed.2d 787 (1983), which involved a California scheme of death sentence review that did not provide for proportionality review.

Petitioner appealed Judge Feldman's rulings on his §2254 application to the United States Fifth Circuit Court of Appeals. After Strickland and Pulley were decided by the Supreme Court, the Fifth Circuit remanded the case to Judge Feldman with instructions to determine the merits of petitioner's §2254 claim based on ineffective assistance of counsel at his trial and to give petitioner a limited period of time within which to amend his §2254 application to include proportionality review of death sentences. Berry v. King, No. 84-3040 (5th Cir. June 12, 1984).

Petitioner timely amended his habeas petition to include the issue of proportionality review contending that the review he received should have been based on a statewide review of capital convictions rather than limited to the parish where the crime was committed. The State of Louisiana waived the exhaustion requirement in order that the issue may be considered in this proceeding. See McGee v. Estelle, 722 F.2d 1205 (5th Cir. 1984) (state may waive the exhaustion requirement).

Judge Feldman, by order of reference dated June 13, 1984, directed this Magistrate to review Berry's application and, if necessary, conduct an evidentiary hearing pursuant to 28 U.S.C. §636(b)(1)(B)(C) and, as applicable, Rule 8 of the Rules governing §2254 applications. This Magistrate held an evidentiary hearing on August 28, 1984, and now reports his findings and recommendation.

II. THE CRIME AND THE ISSUES

A. The Crime

On January 30, 1978, shortly after 10:00 a.m., petitioner, Benjamin A. Berry, and David Pennington arrived in a truck driven from Baton Rouge, Louisiana, where they resided, and parked near the bank they had decided to rob, the Metairie Bank and Trust Company. The robbery was Berry's idea.

First, Pennington entered the bank alone to look around and see if the tellers had much cash. Pennington then returned to the truck and told Berry what he found. Berry decided to go forth with his plan to rob the bank while Pennington waited in the truck.

Berry entered the bank carrying an exposed fifteen round 9 millimeter automatic pistol. Suddenly, there was an exchange of gunfire between Berry and a Jefferson Parish sheriff's deputy who was working a paid security detail at the bank. Three shots were fired by Berry. Two of Berry's shots struck and mortally wounded the guard. The guard fired one shot that hit Berry in the side.

At the time of the exchange of gunfire, there were about seven to ten customers in the bank. While Berry denies any knowledge of a guard being on duty in the bank, Officer Lewis testified that Berry made a statement admitting he knew there was an armed guard in the bank before he entered the bank.

After the exchange of gunfire, Berry immediately fled the bank and he and Pennington returned to Baton Rouge. Berry was forced to seek medical treatment. Upon entering a Baton Rouge hospital, he was arrested and charged with first degree murder in the Jefferson Parish attempted armed robbery. Berry pleaded not guilty and, represented by counsel, Frederick A. Blanche, III, went to trial on October 25, 1978. The trial lasted until October 27, 1978. The jury found Berry guilty of first degree murder. The same jury, in the sentencing phase of the trial, returned a verdict sentencing Berry to death.

B. The Issues:

In the instant proceeding, Berry advances two arguments not previously addressed by this court: 1) he should have received a statewide proportionality review of capital convictions rather than a review limited to the smaller geographic area of Jefferson Parish; and 2) during the trial in the district court, he received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

III. PROPORTIONALITY REVIEW

In Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the United States Supreme Court, after reviewing death sentences imposed under the capital sentence statutes of two states, Texas and Georgia, issued a per curiam opinion holding that the imposition of the death penalty in the cases under review constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

In response to the the holding in Furman, approximately two-thirds of the states, including Louisiana, passed special legislation to conform to Supreme Court guidelines that were intended to eliminate the random, capricious and arbitrary manner in which the death penalty had been imposed.

The general pattern followed by the states was to enact capital case laws that generally included a bifurcated trial, a list of mitigating and aggravating circumstances and automatic appeal to the state's highest court. Louisiana's law follows this pattern and also includes a provision to determine whether the sentence imposed "is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." LSA - C.Cr.P. art. 905.9.1. See also LSA - C.Cr.P. arts. 905 - 905.9.

In Pulley v. Harris, ___ U.S. ____, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), the Supreme Court upheld a California capital sentencing scheme that did not include a provision for proportionality review. The Court observed that in its earlier cases, the Court did not focus essentially upon proportionality review, but was primarily concerned with statutes that would provide prompt, automatic and meaningfully appropriate methods for review of death sentences. Thus, the concept of proportionality review is only one of a number of death sentence guidelines and is not essential to the constitutionality of such schemes.

In view of the Court's decision in Pulley, proportionality review is not necessary in a death sentence scheme that otherwise provides sufficient safeguards to avoid arbitrary imposition of the death penalty. Even before Pulley, in Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982) (en banc), cert. denied, ___U.S. ___, 103 S.Ct. 3553 (1983), the Fifth Circuit Court of Appeals held Louisiana's system of comparative review of death sentences was constitutionally adequate. "Although the Supreme Court has referred to statewide reviews as commendable in the effort to ensure against an arbitrary imposition of the death penalty, it has never indicated that such a review is a constitutional require-

ment.... [A] review of the murder convictions imposed within [the] venire community is sufficient to ensure against arbitrary imposition of the death sentence." Id. at 395. See Maggio v. Williams, ___ U.S. ___, 104 S.Ct. 311, 314 (1983). See also, Martin v. Maggio, No. 81-3496, slip op. 5349 (5th Cir. Aug. 2, 1984).

Berry does not challenge Louisiana's death penalty scheme for lack of proportionality review. He challenges the geographic scope of the review in his case. Petitioner argues that he was denied the equal protection of the laws when he received only a parishwide proportionality review while other capital defendants in Louisiana were receiving a statewide review. If substantiated, this would constitute a valid claim since an instituted procedure, even though not constitutionally mandated must be applied equally to all those similarly situated. However, the Louisiana practice as described below does not correspond to petitioner's claim.

The Louisiana Supreme Court's rule for capital sentence review requires the district attorney to file, on behalf of the state, a memorandum listing each first degree murder case in the district in which the sentence was imposed. La. Sup. Ct. R. 28. The Louisiana Supreme Court then undertakes a comparison of the cases to consider the consistency of the sentence with those imposed in similar cases from the same jurisdiction. See, e.g., State v. Sonnier, 380 So. 2d 1 (La. 1980); State v. Baldwin, 388 So. 2d 664 (La. 1980).

In his amended habeas application, petitioner asserts that the capital defendants in State v. Narcisse, 426 So. 2d 118 (La. 1983) and State v. Moore, 432 So. 2d 118 (La. 1983), did in fact receive a statewide proportionality review. In Narcisse, the Louisiana Supreme Court justified the imposition of the death penalty after a review of cases from parishes other than Lafayette Parish, where the defendant had been sentenced. The court undertook the additional review after finding that it was the first time in fifty years that the death sentence

had been rendered by a jury in Lafayette Parish and that other cases in the parish did not provide an adequate comparison. 426 So. 2d at 139. Similarly, in Moore, the court again reviewed cases from jurisdictions other than Rapides Parish only after finding that there were no cases sufficiently similar in that parish to which a fair comparison could be made. 432 So. 2d at 226.

In the instant case, as mandated by Rule 28, the District Attorney for Jefferson Parish provided the Louisiana Supreme Court a list of first degree murder cases tried in that jurisdiction since 1976. Docket No. 66,060, Supplement to Uniform Capital Sentence Report. This list shows that four first degree murder cases had been tried in the parish. These four cases provided the court with an adequate basis from which the proper comparison of proportionality could be made. In those four cases, the death penalty had not been imposed. However, in the instant case, the court found aggravating circumstances not present in the other cases which warranted the imposition of the death sentence. State v. Berry, 391 So. 2d at 417. Given this adequate basis for comparison, there was no need to resort to a wider proportionality review. See State v. Sonnier, 380 So. 2d at 7 (four other first degree murder prosecutions in the jurisdiction provided an adequate comparison for proportionality review); State v. Baldwin, 388 So. 2d at 677 (two other convictions were sufficient). Accordingly, this Magistrate finds that petitioner received a proportionality review consistent with what other similarly situated defendants were receiving and that therefore he was not denied the equal protection of the laws. Accordingly, petitioner's arguments are without merit.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner sets forth seven grounds to support his claim that his trial counsel rendered ineffective assistance: 1) he was incompetent, conceded guilt at the opening of the trial without petitioner's knowledge and consent and

committed the "ultimate fiasco before the jury by presenting petitioner's mother as his only witness and then changing his mind in front of the jury and withdrawing her as a witness"; 2) counsel's alleged concession and stipulation of "absolute guilt" and all of the elements of first degree murder, including aggravating circumstances to justify the imposition of the death penalty, were done without petitioner's consent and waiver of his constitutional rights invoked by his not guilty plea; 3) failure to investigate and prepare the case for trial; 4) failure to seek out witnesses, including expert witnesses, family members and friends capable of contributing to mitigating circumstances during the sentencing phase of the trial; 5) failure to object that the jury was not allowed to deliberate during the sentencing phase with a list of the mitigating circumstances; 6) failure for lack of diligence to locate a witness who could have laid the foundation for a plea of not guilty by reason of insanity; and 7) counsel was an admitted drug addict and should not have been acting as petitioner's counsel in a first degree murder case when, more likely than not, counsel was ingesting drugs prior to and during the trial and sentencing phase of the case.

It is established law that the Sixth Amendment guarantees a defendant in a criminal proceeding representation by an attorney reasonably likely to render and rendering reasonably effective assistance. See Nelson v. Estelle, 642 F.2d 903 (5th Cir. 1981); Beckham v. Wainwright, 639 F.2d 262 (5th Cir. 1981); Mays v. Balkcom, 631 F.2d 48 (5th Cir. 1980). However, effective assistance of counsel does not mean errorless assistance, nor counsel found ineffective by hindsight. See Nelson, 642 F.2d 903; Beckham, 639 F.2d 262; Clark v. Blackburn, 619 F.2d 431 (5th Cir. 1980); Easter v. Estelle, 609 F.2d 756 (1980). All of the federal courts of appeals have now held that the proper standard for attorney performance is that of reasonably competent assistance. See Trapnell v. United States, 725 F.2d 149, 151-152 (2nd Cir. 1983).

Petitioner's arguments now must be examined in accordance with the pronouncements of the United States Supreme Court in Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052 (1984). In that case, the claim of ineffective assistance of counsel focused on the sentencing phase of the trial. As in the case sub judice, the penalty imposed by the jury was death.

Rather than provide a laundry list of rigid and hypertechnical standards for judging effective assistance, the Supreme Court, recognizing that the conduct of a trial "is an art," Id. at ___, 104 S.Ct. at 2061, discussed general principles of law that may be applied in a myriad of factual situations.

Perhaps the most important analytic concept in determining effective assistance lies in the Supreme Court's holding that "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect often will be so, that course should be followed." Id. at ___, 104 S.Ct. at 2069-2070.

In the performance/prejudice test approved by the Supreme Court in Strickland the burden of proof squarely rests with the petitioner to establish that he was sufficiently prejudiced by his counsel's ineptness to the extent of undermining the confidence in the outcome of his trial. See Id. at ___, 104 S.Ct. at 2068.

It is an equally important principle of law that state court findings of fact on the trial and appellate levels must, under most circumstances, be accorded a presumption of correctness. 28 U.S.C. §2254(d); Marshall v. Lonberger, ___ U.S.___, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983); Sumner v. Mata, 449 U.S. 539, 101 ___S.Ct. 764, 66 L.Ed.2d 722 (1982); Sumner v. Mata, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982); Asper v. Estelle, 709 F.2d 356 (5th Cir. 1983); Germany v. Estelle, 639 F.2d 1301 (5th Cir. 1981), cert. denied, 454 U.S. 850,

102 S.Ct. 290. Therefore, the burden is on petitioner in the case sub judice to establish "by convincing evidence that the factual determination by the state court was erroneous." Sumner v. Mata, 449 U.S. at 550, 101 S.Ct. at 771.

Having set forth the procedural history of this case, the essential details of the crime, and the applicable principles of law, we now turn to an examination of the grounds set forth by petitioner against his trial counsel, Frederick A. Blanche, III.

A. Grounds Nos. One and Two:

These two grounds are grouped together because they concern what petitioner's counsel has characterized as concessions of guilt and admissions of aggravating circumstances made by Berry's attorney without Berry's prior knowledge or consent. These admissions and concessions were sufficient to justify the imposition of the death sentence.

The record indicates that petitioner pleaded "not guilty" to first degree murder on September 22, 1978. However, Blanche stated in his opening statement to the jury:

> From the very beginning, we will concede to you or I will concede to you on behalf of Ben Berry that he did intend to rob a branch of the Metairie Bank... That because our Supreme Court has promulgated rules there will be some aggravating circumstances that will be brought to your attention

Docket No. 66,060, Vol. II, p. 13.

> I'm not suggesting to you that [Berry] is innocent of a crime, but I am asking you to presume at least at this point, that he may be innocent of the crime of first degree murder.

Id. at 17-18.

During the testimony of Don Carson, the evidence custodian and crimes scene technician for the Jefferson Parish Sheriff's Office, the prosecutor stopped his questioning and stated to the court in the presence of the jury: "Your Honor, at this time, all the rest of the testimony of Deputy Carson would be as to the chain of evidence which I understand there will be a stipulation to the chain." Id. at 58-59. In response, Blanche stated: "I stipulate there is no problem with the chain of evidence." Id. at 59. The court thereupon instructed the jury

about the meaning of a stipulation, advising the jury that they are to "accept those facts [in the stipulations] as having been proved, the same as if they had been proved to their (sic) satisfaction." Id.

The trial transcript evidences that before the jury returned from a lunch recess, discussions were held at the bench with Judge Zaccaria, the trial judge, and as a result of the conference, a stipulation was agreed upon by the State and counsel for Berry. Id. at 65. The court labeled the stipulation "Stipulation #2" and requested counsel to sign it before the court read it to the jury. Blanche signed it on behalf of petitioner and the assistant district attorney prosecuting Berry signed it on behalf of the State. The jury heard the following stipulation read to them by the court:

> Alright, Ladies and Gentlemen of the Jury, I have before me a document which contains a stipulation to a set of facts agreed upon by the State and by the Defense Counsels. I'm going to read this to you and you're to accept these facts as having been proven, the same as if they had been proven to your satisfaction on the witness stand. You understand? ---O.K. "First, that the defendant", that's the defendant, Berry, "went to the Metairie Bank on the morning of January 30th, 1978, with the intent of committing an armed robbery. Secondly, after entering the bank the defendant fired three shots, two of which struck and killed Deputy Robert Cochran. Thirdly, that Deputy Cochran did fire one shot with his service revolver which shot struck the defendant. And fourthly, a spent pellet was removed from the defendant and if Technician Ron Singer would testify, he would testify that the pellet recovered from the defendant was fired by Deputy Cochran's service revolver. And fifth and last, that the Detective recovered a spent 9 mm pellet from the defendant's home in Baton Rouge and Technician Singer would testify that pellet was fired by the same pistol which fired the pellet recovered from Deputy Cochran's body." Now, you are to accept those five statements read by me just now as facts having been proven and established in the case. Do you all understand that? ---- O.K. Would you file this of record please. Make that "Stipulation #2" as title of the exhibit.

Id. at 66-67.

In analyzing Berry's contention that Blanche's admissions and the above stipulations constituted ineffective assistance of counsel, it is necessary to determine whether Berry had expressly or impliedly consented to these admissions and

if he suffered any prejudice by reason of the admissions and stipulation.

The Sixth Circuit in Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981), cert. denied, 454 U.S. 1091, 102 S.Ct. 656, a case with a somewhat similar factual situation, held that "petitioner was deprived of effective assistance of counsel when his own lawyer admitted his client's guilt, without first obtaining his client's consent to this strategy." Id. at 650. In Wiley, the court held that "an attorney may not stipulate to facts which amount to the fundamental equivalent of a guilty plea. United States v. Brown, 428 F.2d 1100 (D.C. Cir. 1970); Cox v. Hutto, 589 F.2d 394 (8th Cir. 1979)." Id. at 649. However, where the petitioner does have knowledge and consents to a proposed stipulation of his guilt, it has been held that such knowledge and consent is proper and petitioner's right to effective assistance of counsel has not been denied. See Palfay v. Cardwell, 448 F.2d 328, 330 (6th Cir. 1971).

In Wiley, the Sixth Circuit Court of Appeals indicated that a decision to plead "guilty" or "not guilty" is a decision "reserved solely for the accused based on his intelligent and voluntary choice." 647 F.2d at 648-649. (citing Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)). The court in Wiley also stated: "Similarly, an attorney may not admit his client's guilt which is contrary to his client's earlier entered plea of not guilty unless the defendant unequivocally understands the consequences of the admission." Id. at 649. See Brookhart v. Janis, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1965). The Sixth Circuit in Wiley, held that consent must be shown in a manner consistent with Boykin. 647 F.2d at 650. The D. C. Circuit in United States v. Brown, 428 F.2d at 1103, held that when counsel stipulates that defendant had committed all the acts charged in the indictment, the trial judge should address the defendant personally in a manner consistent with Rule 11 of the Federal Rules of Criminal Procedure.

However, in United States v. Robertson, 698 F.2d 703 (5th Cir. 1983) the Fifth Circuit Court of Appeals held that "a plea of not guilty by a defendant represented by counsel, even coupled with an inculpatory stipulation, is a plea of not guilty, and absent evidence of any prosecutorial overreaching, the defendant is not entitled to the protections of Rule 11." Id. at 710. Rule 11 of the Federal Rules of Criminal Procedure requires the trial court to inform the defendant of his rights and to determine that the plea is entered voluntarily. In examining the policy considerations behind Rule 11, the court stated:

> The only situation in which the Federal Rules of Criminal Procedure authorizes a prosecutor to bargain with a defendant is where a defendant agrees to plead guilty or nolo contendere. As a result, only in those two settings is the defendant's voluntariness subject to officially sanctioned coercion. Robertson does not contend that the prosecutor or the trial court judge made any express or implied promises to him in return for his inculpatory stipulations. Thus, absent any evidence of prosecutorial overreaching, Robertson's voluntariness seems no more vulnerable than in any waiver of constitutional proportions.

Id. at 708-709.

The Ninth Circuit in United States v. Ferreboeuf, 632 F.2d 832 (9th Cir. 1980), stated:

> Appellant asks that we make a ruling requiring the trial court to question defendant personally as to the voluntariness of any stipulation of a crucial fact. This we decline to do. Such a rule would needlessly delay and confuse the conduct of a typical trial.... Instead, we hold that when a stipulation to a crucial fact is entered into the record in open court in the presence of the defendant, and is agreed to by defendant's acknowledged counsel, the trial court may reasonably assume that the defendant is aware of the content of the stipulation and agrees to it through his or her attorney. Unless a criminal defendant indicates objection at the time the stipulation is made, he or she is ordinarily bound by such stipulation.

Id. at 836.

In the instant case, Berry himself testified under oath:

> Once I entered the door? I took about three, maybe four, steps and I already had my gun drawn when I walked in the door. I took about three or four steps and I heard someone holler "Look out!" I glanced to my left and there was a man being pushed to the ground and another man drawing a revolver. I started to turn towards him and he fired a shot that struck me in the left side. And about

the same time I, not really aiming, I just pulled the trigger on my revolver, on my automatic weapon, and I saw the man fall to the floor.
Docket No. 66,060, Vol. III, p. 105.

Accordingly, not only did Berry consent to the stipulation by his silence and refusal to deny the correctness of the same, but his testimony is consistent with "Stipulation #2" and shows Berry's consent to the admission of these facts. The stipulation regarding the chain of evidence does not stipulate any crucial fact that the State was not prepared to prove by an overwhelming amount of evidence.

The burden was upon Berry to prove that the statements of his counsel in opening remarks before the jury and the above stipulations sufficiently prejudiced his trial to the extent that they destroyed confidence in the results. In view of the above, Berry has failed to prove any prejudice by virtue of Blanche's acts.

B. GROUNDS THREE, FOUR AND SIX:

These three grounds are grouped together because they allege the same basic failure on the part of Berry's counsel to fully investigate and prepare the case. Specifically, Berry alleges that his counsel failed to seek out witnesses, including expert witnesses, friends and family members, who were capable of providing mitigating circumstances during the sentencing phase of the trial, and failed or was not diligent in locating a witness who could have laid the foundation for a plea of not guilty by reason of insanity.

The Supreme Court in Strickland, indicated that counsel has a duty to make a "reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary. In any effectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgment." ____ U.S. at _____, 104 S.Ct. at 2066.

Berry had approximately six years from the time of his conviction to the time of the evidentiary hearing before this Magistrate to provide the names of witnesses who should have been called. Nevertheless, Berry was not able to establish that the failure to call any witnesses on his behalf caused him to suffer prejudice during his first degree murder trial.

It is true that Blanche did not subpoena any witnesses for the trial. Docket No. 78-2151, 1982, p. 234. But he testified he did interview Mr. and Mrs. Berry, the parents of petitioner, a priest whom he considered an expert on the death penalty, a psychologist, and his father-in-law who was a medical doctor. Id. at 242. Blanche also attempted to contact the branch manager of the bank that was robbed, but was told by him that "[i]t was the bank's policy that the employees had been instructed not to talk to [him] or cooperate with [him] in any way." Id. at 229.

One witness Berry's counsel may have had in mind was Ruth East. She was outside the bank as Berry fled past her from the scene of the crime. Her testimony at the state habeas hearing indicates that she saw Berry as he fled out of the bank, and that he looked like a "zombie" (sic) and walked strangely. Id. at 180. This person was not offered by Berry at the evidentiary hearing before this Magistrate, but she did testify at the state postconviction habeas proceeding. Id. at 177. In the Magistrate's opinion, East's testimony would not have been helpful to Berry, and he failed to prove he was prejudiced by Blanche's failure to call her as a witness.

Similarly, Blanche did not offer the testimony of a witness he interviewed, Mrs. Carole Wunderlich, in whose home Berry had lived. The Louisiana Supreme Court observed that "While Mrs. Wunderlich would have testified that defendant was a good worker and a trusted friend, she would have to admit that Berry smoked pot and had received an undesirable discharge from military service. It is difficult to second guess a defense attorney on a decision not to call a witness who has

some favorable things to say but would corroborate other unfavorable things." State v. Berry, 430 So.2d at 1012-1013.

Because of Berry's background, any witness who knew Berry presumably would have known something about his drug abuse, his association with a motorcycle gang, his ownership of a gun, or his criminal record. It was perhaps a tactical decision by Blanche not to call such witnesses who, under cross-examination by the State, would have been questioned about their knowledge of Berry's background, revealing damaging evidence before the jury.

Due to the overwhelming evidence of Berry's guilt, it would not be unreasonable for his counsel not to investigate or to limit his investigations. In a similar conclusion, the Louisiana Supreme Court observed that "[a]ttorney Blanche came to a reasonable conclusion that there were no witnesses who could be helpful to his client." State v. Berry, 430 So. 2d at 1012.

Further, not a single witness was identified by Berry who could have provided any of the mitigating circumstances listed in LSA-C.Cr.P. art. 905.5. Thus, Berry failed to carry the burden of proving Blanche's conduct in not calling any witnesses prejudiced his sufficiently to undermine confidence in the trial's outcome.

C. GROUND FIVE:

It is charged by Berry that during the sentencing phase of the trial, his counsel did not object to the trial court's failure to provide the jurors with a list of mitigating circumstances. Pursuant to LSA C.Cr.P. art. 905.3 "[t]he jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances."

During the jury charges, after the sentencing phase of the trial was concluded, the court stated to the jury: "The Clerk will furnish each of you with a list of the statutory aggravating and mitigating circumstances which you may bring with you during deliberation." Docket No. 66,060, Part 2, Vol. III, p. 29.

Upon completion of the charges, the trial judge directed his clerk to hand the jury the verdict form and sought the approval of counsel for the State and Mr. Berry to send the jury to deliberate. The judge then directed the jury to "commence your deliberation and we will supply you with twelve copies of the aggravating and mitigating circumstances that you are to consider." Id. at 33-34.

The Louisiana Supreme Court, in discussing this issue, stated: "The record is ambivalent. The trial judge's remarks indicate that the jury was probably given an initial list of the statutory aggravating and mitigating circumstances and later furnished copies for each juror." State v. Berry, 430 So. 2d at 1013.

The jury verdict as read by the clerk stated, in part: "Having found the below-listed statutory aggravating circumstance or circumstance and after consideration of the mitigating circumstances offered, the Jury unanimously recommends that Benjamin A. Berry be sentenced to death." Id. at 36. The hand-written aggravating circumstances made as an addendum to the verdict reads:

> Aggravating circumstances, circumstances found: The offender was engaged in the perpetration or attempted perpetration of armed robbery; The victim was a peace officer engaged in his lawful duties; The offender knowingly created the risk of death or great bodily harm to more than one person.

Id. at 38.

In a comparison of the jury's findings of aggravating circumstances with the statutory list in LSA - C.Cr.P. art. 905.4, it appears that the jury found three aggravating circumstances and copied them verbatim from the statute. All of the above suggests to the Magistrate that the jury either had the list of aggravating and mitigating circumstances, or made detailed notes during the court's jury charges. In any event, the Magistrate finds that petitioner has failed to carry the burden of proving that he was prejudiced.

D. GROUND SEVEN:

This claim of ineffective assistance is predicated upon the uncontradicted fact that Berry's attorney had a drug addiction problem, was hospitalized for the same and had a previous felony conviction in Florida relating to drug activities. The fact findings by Judge Thomas C. Wicker in the state habeas proceeding confirm that Blanche was arrested in Florida in 1977 for illegal possession of marijuana and cocaine. He pleaded guilty and was sentenced to serve thirty days in jail. He was placed on five years probation. Docket No. 78-2151, Vol. IV, Exhibit C, p. 9.

The district judge before whom the case was tried stated that he had no cause whatsoever to suspect that Blanche used any illegal drugs at any time during his employment on the trial level of this case. Docket No. 78-2151, Vol. I, p. 137. The judge testified that he did not observe any behavior on the part of Blanche which would have suggested to him the use of alcohol or drugs. Id. Blanche testified under oath that during his representation of Berry from February, 1978 through the three days of the trial in October of 1978, he did not "use or consume any controlled or dangerous substances." Id. at 218. This is the critical period.

Judge Wicker indicated that he had grave doubts that Blanche used any illegal drugs at any time during his employment on the trial level of the case. Docket No. 78-2151, Vol. IV, Exhibit C, p. 9. Indeed, Judge Wicker concluded that Berry failed to prove that Blanche consumed any drugs during his representation of Berry which adversely affected Blanche's representation of Berry. Id.

Blanche's medical records were introduced into evidence at the evidentiary hearing before this Magistrate. They are his medical records from the Baton Rouge Chemical Dependency Units, Inc. in Baton Rouge, Louisiana, for the period of confinement beginning December 10, 1982 through and including January 12, 1983. These re indicate that when Blanche entered the Chemical Dependency

Units on December 10, 1982, approximately four years following the conclusion of the Berry trial, he had severe drug dependency problems, including the use of a number of controlled drugs as well as marijuana, LSD and other hallucinogenic agents. He was also a heavy user of Demerol, Dilaudid and heroin from 1971 to 1979. He drank six to twelve beers per day until he fell asleep. He used cocaine about once a month, both by snorting and intravenously. He smoked approximately ten joints of marijuana a day. The hospital notes indicate a final diagnosis of alcoholism, drug addiction, anxiety depression and other matters not relevant to this hearing.

Accordingly, while the evidence shows that Blanche had drug dependency problems, the state trial court found as a fact that Blanche was not on drugs during the Berry trial and Blanche testified that he had not used any drugs or controlled or dangerous substances during the three day trial.

In the federal habeas hearing, Berry's counsel places emphasis on the testimony of Mary Beth Ellis, at whose home Blanche and one Wynne Dyer stayed the night before the resumption of the trial. Miss Ellis, a friend of Blanche, was told by him that he needed a place to discuss the trial for the next day. Docket No. Fed. 83-5259, p. 73. She permitted him and Dyer to stay in her apartment for the night. She went out and when she returned between 11:00 and 11:30 p.m., she noticed that there were Preludins on a table, a bottle had been emptied and there were some loose pills in the bathroom. She also noticed a spoon and some matches. She was not sure whether the matches had been lit. Id. at 71-73. This was the night before the second day of the trial. Id. at 75. She described Blanche as being "in very good shape" when he came to her apartment to ask if he could spend the night. She testified, "he was very serious" and concerned about the trial. Id. at 77. She did not notice anything unusual about Blanche, including his speech, his dress or his mannerisms. Id. at 78. She gave him a ride the next morning, but noticed nothing unusual about his appearance, condition, behavior,

speech patterns, mannerisms or anything else that would indicate he was not normal Id. at 80.

The foregoing evidence does not establish that Blanche was under the influence of narcotics during the time he tried the Berry case; nor is there any evidence to overcome the strong presumption of correctness that must be afforded to the fact findings of Judge Wicker during the state postconviction evidentiary hearing.

The petitioner has failed to establish that Blanche was using drugs at the time of his representation. In any event, petitioner failed to establish that he suffered any prejudice as a result of Blanche's alleged drug use.

RECOMMENDATION

It is the Magistrate's recommendation that the petition of Benjamin A. Berry for the issuance of a writ of habeas corpus pursuant to 28 U.S.C. §2254 be DISMISSED.

Failure to file written objections to the proposed findings and recommendation contained in this report within ten (10) days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal. Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982).

New Orleans, Louisiana, this 26th day of October, 1984.

JACOB J. ADLER,
UNITED STATES MAGISTRATE

APPENDIX "F"

LOUISIANA SUPREME COURT DECISION AFFIRMING
STATE DISTRICT COURT DENIAL OF POST CONVICTION
APPLICATION FOR HABEAS CORPUS DATED APRIL 4, 1983
REPORTED IN 430 So.2d 1005 (La.1983)
CONSISTING OF 11 PAGES
NUMBERED 69 THRU 79)

STATE of Louisiana

v.

Benjamin BERRY.

No. 82-K-2515.

Supreme Court of Louisiana.

April 4, 1983.

Concurring Opinion May 10, 1983.

Rehearings Denied May 20, 1983.

Concurring Opinion May 26, 1983.

Defendant was convicted in the Twenty-Fourth Judicial District Court, Parish of Jefferson, Thomas C. Wicker, J., of first-degree murder, and he appealed. The Supreme Court, Watson, J., held that: (1) defendant was not deprived of effective assistance of counsel; (2) defendant failed to substantiate claim that jury was not furnished with written list of mitigating circumstances during their deliberations; (3) reference by prosecutor to appellate review of death sentence during closing argument was not error; and (4) defendant was not deprived of due process, equal protection or effective counsel because of remarks in defense attorney's opening argument.

Affirmed.

Calogero, J., concurred with reasons.

Dennis, J., concurred with reasons.

1. Criminal Law ⇐668

In sentencing phase of capital case, defendant is entitled to reasonably competent assistance of attorney acting as a diligent, conscientious advocate for his life. U.S.C.A. Const.Amend. 6; LSA-Const. Art. 1, § 13.

2. Criminal Law ⇐641.13(1)

Evaluation of habeas corpus petition alleging ineffective assistance of counsel is a two-step process: first inquiry is whether counsel has violated duty to his client, for example, failing to prepare for trial; and, if so, second inquiry is whether violation has resulted in prejudice to defense of case. U.S.C.A. Const.Amend. 6; LSA-Const. Art. 1, § 13.

3. Criminal Law ⇐641.13(5)

Failure of defense attorney to learn about witness who would have testified that defendant, charged with armed robbery and first-degree murder, appeared to be pale, in shock, like a zombie and walked strangely, indicated a deficiency in investigation and preparation; however, no prejudice to defendant was shown, and therefore such failure to prepare did not constitute ineffective assistance of counsel, because description witness would have given was consistent with appearance of person who had committed homicide and been shot in exchange of gunfire. U.S.C.A. Const. Amend. 6; LSA-Const. Art. 1, § 13.

4. Criminal Law ⇐641.13(6)

Even assuming that indigent defender funds were available to defense attorney for employing experts or investigators, there was no showing that expert or lay witnesses could have been discovered who would have bolstered defense, and therefore failure to use such funds did not constitute ineffective assistance of counsel. U.S.C.A. Const.Amend. 6; LSA-Const. Art. 1, § 13.

5. Criminal Law ⇐641.13(8)

Defense attorney's stipulation of chain of evidence did not constitute ineffective assistance of counsel, because there was no showing of a flaw in the chain. U.S.C.A. Const.Amend. 6; LSA-Const. Art. 1, § 13.

6. Criminal Law ⇐641.13(2)

No prejudice to defendant was shown in defense counsel's opening statement in which he told jury he had discovered there was film of criminal episode at bank, while he discovered subsequently that film was not favorable to defendant, while defense attorney used poor judgment in mentioning film to jury without having seen it, he used good judgment in not showing it to jury, and therefore defendant was not denied effective assistance of counsel. U.S.C.A. Const.Amend. 6; LSA-Const. Art. 1, § 13.

7. Criminal Law ⇐641.13(6)

Stipulation to which defense attorney agreed was an accurate representation of facts of criminal event and did not, as defendant contended, admit that defendant fired first; therefore, by entering stipulation, defense attorney did not violate any duty to defendant, and there was no showing of prejudice sufficient to constitute ineffective assistance of counsel. U.S.C.A. Const.Amend. 6; LSA-Const. Art. 1, § 13.

8. Criminal Law ⇐641.13(6)

There was no evidence of witnesses who could have helped defense, and thus no prejudice was demonstrated so as to compel finding that defense attorney was ineffective in failing to call any witnesses other than defendant in guilt phase of trial. U.S.C.A. Const.Amend. 6; LSA-Const. Art. 1, § 13.

9. Criminal Law ⇐641.13(6)

Defense attorney did not fail in his duty to defendant by not calling two witnesses, including defendant's mother, while first witness would have testified that defendant was a good worker and trusted friend, she would have had to admit that defendant smoked pot and had received an undesirable discharge from military service, and with respect to defendant's mother, she could not testify, and defense attorney did next best thing and had her seated on front row, where she sobbed under observation of jury. U.S.C.A. Const.Amend. 6; LSA-Const. Art. 1, § 13.

10. Criminal Law ⇐1141(2)

Record was ambivalent as to whether jury received written list of mitigating circumstances during their deliberations; however, burden of proving that he was entitled to relief on that basis rested with defendant, and therefore defendant's claim was unsubstantiated. LSA-C.Cr.P. arts. 905.2, 930.2.

11. Criminal Law ⇐627.5(1)

State did not suppress exculpatory evidence in failing to produce witness at trial or disclose her knowledge to defense; her testimony would not have been exculpatory.

12. Criminal Law ⇐627.6(3)

State did not withhold and suppress favorable evidence consisting of pictures made by bank's cameras; none of the pictures were at all exculpatory.

13. Homicide ⇐326

Errors alleged in death cases are considered despite lack of objection, and therefore defendant's counsel's failure to object to prosecutor's remarks during closing argument was immaterial.

14. Homicide ⇐355

Finality of death penalty outweighs procedural requirements during trial and appeal.

15. Criminal Law ⇐713

Closing argument by prosecutor, who told jury that statutory scheme, recognizing seriousness of consequences, provided adequate safeguards against arbitrary imposition of death penalty, and that weighing of all considerations enumerated in statute warranted imposition in case, did not serve to lessen significance of jury's role in overall scheme, and therefore was not error.

16. Constitutional Law ⇐250.3(3), 268.1(6)
Criminal Law ⇐641.13(2)

Remarks in defense attorney's opening argument to jury did not deprive defendant of due process, equal protection or effective counsel; first remark, in which attorney conceded that defendant intended to rob bank, was a statement of an obvious and incontestable fact, and second statement, in which defense attorney stated that "I'm not suggesting to you that he is innocent of a crime, but I'm asking you to presume, at least at this point, that he may be innocent of the crime of First Degree Murder," formed part of theme of opening statement, that is, that defendant, although culpable, was not guilty of first-degree murder. U.S.C.A. Const.Amends. 5, 6, 14.

Joseph L. Montgomery, Metairie, Martha Simmons, Gretna, for relator.

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William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., John M. Mamoulides, Dist. Atty., William C. Credo, III, Gordan Konrad, Asst. Dist. Attys., for respondents.

WATSON, Justice.*

Defendant, Benjamin Berry, entered a branch bank in Jefferson Parish to commit an armed robbery and shot a security guard, an off-duty deputy sheriff, to death. Berry was tried and convicted of first degree murder. After a sentencing hearing, the jury recommended the death penalty and Berry was sentenced accordingly. The conviction and sentence were affirmed. *State v. Berry*, 391 So.2d 406 (La., 1980), cert. denied 451 U.S. 1010, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981). Defendant then filed a petition for writ of habeas corpus in the Twenty-Fourth Judicial District Court.

At the evidentiary hearing held by Judge Thomas Wicker on the application, defendant contended that attorney Fred Blanche, III, counsel retained for trial and appeal, was using narcotics from February, 1976, which he was engaged, until October, 1978, the month of trial. Defendant also argued that his counsel was ineffective for other reasons. After hearing the witnesses, the trial court held:

> that petitioner has failed to prove that Blanche consumed any drugs during his representation of Berry which adversely affected Blanche's representation of petitioner. That leaves for consideration petitioner's contention that Blanche failed to properly investigate, prepare, interview and call lay and expert witnesses and generally failed to adequately prepare for the trial of a first degree murder case.
>
> . . . . . .
>
> "After reviewing the entire record of this case and hearing the testimony during these proceedings, this court is persuaded that Fred Blanche, III, did render reasonably effective assistance to petitioner." (Docket No. 80-E-6618, Vol. I, Tr. 311-312)

A writ was granted to review the decision of the trial court. Defendant contends that the trial court erred in ruling that he had effective assistance of counsel at trial and sentencing.

LEGAL STANDARD FOR EFFECTIVE ASSISTANCE OF COUNSEL

[1] Defendants in criminal trials are entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Art. 1, § 13 of the Louisiana Constitution. "Effective assistance" is difficult to define. Louisiana requires that counsel "meet the level of competency normally demanded in criminal cases". *State v. Folse*, 422 So.2d 370 at 380 (La., 1982). This is essentially the standard enunciated in *McMann v. Richard*, 397 U.S. 759 at 771, 90 S.Ct. 1441 at 1449, 25 L.Ed.2d 763 at 773 (1970). In the sentencing phase of a capital case, defendant is entitled to "the reasonably competent assistance of an attorney acting as a diligent, conscientious advocate for his life." *State v. Myles*, 389 So.2d 12 at 28 (La., 1979).

The United States Supreme Court recognizes defendants' right to a lawyer who is within the normal range of competence, the *McMann* definition of effective counsel, and recently expressed the requirement as "a competent attorney." *Engle v. Isaac*, 456 U.S. 107 at 134, 102 S.Ct. 1558 at 1574, 71 L.Ed.2d 783 at 804 (1982). However, the nation's highest court has never refined its definition, leaving the task to the circuit courts. See *McQueen v. Swenson*, 498 F.2d 207 at 214 (8 Cir.1974) and the six opinions filed by the United States Court of Appeal, Fifth Circuit, Unit B, in *Washington v. Strickland*, 693 F.2d 1243 (1982). One scholarly treatment of the subject notes:

> "Implicitly, the sixth amendment also guarantees a right to effective assistance, but the Supreme Court has never fully defined the scope of this right. Without firm guidance, the circuits have experimented with numerous definitions of 'ef-

* Judge CASS CANNON of the Court of Appeal, Third Circuit, participated in this decision as Associate Justice Ad Hoc in place of BLANCHE, J., recused.

fective aid,' and a consensus has finally emerged. Nearly every federal court now equates effective assistance of counsel with competent representation." (Footnotes omitted) 65 Cornell Law Review 669 at 680, 681.

A "competent attorney" giving competent representation is essentially one who "meet[s] the level of competency normally demanded". *Paiva*, supra.

[2] An outstanding analysis of the law and logic involved in considering claims of ineffective assistance of counsel is found in *McQueen v. Swenson*, supra.[1] *McQueen* elucidates a two-step inquiry for determining effectiveness of counsel as follows:

"Evaluation of a habeas corpus petition alleging ineffective assistance of counsel is a two-step process: first, determining, . . . whether there has been a failure to perform some duty, as essential as the duty of investigation, owed by a defense attorney to his client; and second, determining . . . whether that failure prejudiced his defense." 488 F.2d 207 at 210.

McQueen involved a first degree murder trial where the state produced twenty-six witnesses to negate defendant's self-defense theory. The attorney appointed to represent defendant testified that trial preparation consisted of several jail interviews with his client, most of which were spent discussing another homicide charged against the man. The attorney knew of the forty-one witnesses, including the twenty-six who testified, listed on the indictment, but did not undertake to interview any of them. His general policy was not to interview prosecution witnesses because he did not consider it his duty and he thought it put a lawyer in a "bad light". 488 F.2d 207 at 212.

The *McQueen* court found that the attorney had violated his duty of adequate preparation for trial, but placed the burden on the petitioner in the habeas proceedings to establish prejudice resulting from that inadequate preparation. The holding was summarized as follows:

". . . [F]ailure to make a reasonable investigation may amount to ineffective assistance of counsel. . . ."

* * * * * *

However, ". . . the failure to investigate—though a constitutional error—might in certain circumstances be a 'harmless one' and hence would not justify habeas corpus relief. . . . *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). . . ."

* * * * * *

On remand ". . . the petitioner must shoulder an initial burden of showing the existence of admissible evidence which could have been uncovered by reasonable investigation and which would have proved helpful to the defendant either on cross-examination or in his case-in-chief at the original trial. Once this showing is made, a new trial is warranted unless the court is able to declare a belief that the admission of such evidence was harmless beyond a reasonable doubt." 488 F.2d 207 at 217, 218 and 220.

The two-step *McQueen* analysis is particularly appropriate when it is alleged in a habeas proceeding that counsel was ineffective for lack of preparation. To reiterate: (1) the first inquiry is whether counsel has violated a duty to his client, for example, failing to prepare for trial; and, if so (2) the second inquiry is whether the violation has resulted in prejudice to the defense of the case.[2] The initial burden of proof is on

1. The Eighth Circuit had historically followed the "mockery of justice" standard and effectively abandoned it in *McQueen* without specifically deciding to do so. The later case of *United States v. Easter*, 539 F.2d 698 (8 Cir., 1976) equates failure to exercise the customary skills and diligence of a reasonably competent attorney with reducing the proceedings to a "mockery of justice".

2. This is consistent with prior Louisiana law which has recognized that a complaint of ineffectiveness must be coupled with a showing by defendant of prejudice. *State v. Landrum*, 307 So.2d 340 (La., 1975); *State v. Kemmer*, 336 So.2d 824 (La., 1976); *State v. Bell*, 346 So.2d 1080 (La., 1977). *State v. Sams*, 438 So.2d 444 (La., 1983). Two Louisiana cases have recently described effective assistance as ". . . not error-free counsel, and not counsel judged ineffec-

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defendant, but, even met, he is entitled to a new trial unless the court can say beyond a reasonable doubt the error was harmless. *Fowler v. Parratt*, 682 F.2d 748 (8 Cir., 1982). Compare *United States v. Haynes*, 687 F.2d 689 (3 Cir., 1982). See 80 N.W. L.R. 289 at 304 and 76 Harvard L.Rev. 1494.

EVIDENTIARY HEARING ON WRIT APPLICATION

The evidence at the evidentiary hearing on defendant's application for writ of habeas corpus focused primarily on the alleged use of drugs by counsel and is summarized as follows:

Roger LeBlanc, a former friend of attorney Blanche, gave considerable testimony concerning Blanche's use of drugs. According to LeBlanc, Blanche was a frequent user of drugs during the period which would have coincided with the preparation and trial of defendant's case. LeBlanc admitted that he and Blanche are no longer friends, on the contrary, they are litigating a personal lawsuit involving several million dollars.

Henry McCrossen, the assistant manager of the branch bank on the day of the homicide, testified that defendant "walked in shooting" (Docket No. 82-K-2815, Vol. 2, Tr 247).

Witness Mary Davis gave only meager testimony and witness Anthony Kelly took the Fifth Amendment. Gary Eldridge, a private investigator, identified a report.

Martha Berry, the mother of defendant, testified that she retained attorney Blanche, being unaware that he was on probation for a drug violation in Florida. According to Mrs. Berry, Blanche did not interview her about defendant's family history or childhood. She testified that Blanche first informed her in the courtroom after defendant was convicted that she would be a witness at the sentencing. Being too emotional at that point to speak, she could not testify.

Carole Wunderlich, co-owner with her husband of a radiator service in Baton Rouge, said she told Blanche that she would come to the trial and testify on behalf of Berry that he was a good worker and a trusted friend. However, she would have had to admit that she did not know Berry was a member of a motorcycle gang and brought a gun to do battle if necessary with other gangs. Also, she would have had to disclose to the jury that defendant smoked pot and received an undesirable discharge from the military.

It was stipulated that two brothers and a sister of defendant, if called at trial, would have testified substantially the same as Wunderlich on behalf of Berry. Another witness, one Frank Elms, was not present but apparently it was stipulated that he would have also testified on behalf of the defendant at the sentencing hearing.

Frank Zaccaria, a district judge of approximately sixteen years experience, presided over the guilt and sentencing phase of Berry's trial and testified that Blanche's defense work was "outstanding". After noting that Blanche appeared before him not only at trial but in connection with many pretrial motions, Judge Zaccaria summed up Blanche's performance as a lawyer as follows:

"Frankly, I thought it was outstanding to a point where I complimented him from the bench. I think that the transcripts will show that. At one time he did everything he could in his power and he used every strategy that he could, including suggestions to the court, because of the trial strategy, that he wanted me to declare him incompetent. And I told him just the opposite, that I thought he did an outstanding job." (Docket No. 82-K-2815, Vol. II, Tr. 273-274)

tive by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." *State v. Ratcliff*, 410 So.2d 1381 (La., 1982) quoting from *U.S. v. Prejean*, 666 F.2d 907 (5 Cir.1974). See *Herring v. Estelle*, 491 F.2d 125 (5 Cir.1974) and *MacKenna v. Ellis*, 280 F.2d 592, cert. denied 368 U.S. 877, 82 S.Ct.

101, 7 L.Ed.2d 78 (1961). See also *State v. Sutton*, supra. The quoted definition is probably the easier to comprehend representation. The difficulty is in determining what is a given case is "reasonably effective" and "competent". The McQueen case provides a workable standard of analysis.

The judge had no reason to suspect that Blanche was on drugs at any time during trial.

Dr. Richard Eugene Gary testified as to the appearance of a person either taking cocaine or "crashing" from cocaine.

Ruth East testified that she had talked to the district attorney's office but never to Blanche. Following the homicide, she was outside the bank and saw defendant leave. She described him as looking like a "zombie" (sic) and walking strangely. (Defendant had been shot in the lower part of the left chest by the security guard.)

Dr. Monroe Samuels talked about bullets and the paths taken by them in the victim and defendant.

Joseph Darby, a reporter experienced in court proceedings, covered the trial. Talking to Blanche at least once a day throughout, he noticed nothing unusual. In his opinion, Blanche did an "effective job".

Attorney Jay C. Zainey represented Pennington, who was involved in the abortive bank robbery with Berry, and described Blanche's performance as "fine". Zainey and Blanche worked together, providing each other with copies of pleadings, discussing strategy and motions, and the progress of the Berry trial. Summing up, Zainey said: ". . . looking back, I don't recall any criticism that I had. He didn't have a whole lot to work with." (Docket No. 83-K-2515, Vol. II, Tr. 481) Zainey saw no indication whatsoever that Blanche was using drugs. On cross-examination, Zainey agreed that Blanche should have prepared Berry's mother for testifying, but noted that Blanche made sure she sat on the front row crying. According to Zainey, it was defendant Berry who decided that his mother should not take the witness stand.

Fred A. Blanche, III, denied the use of drugs during the period of February-October, 1978. However, he admitted being on probation. He said his past legal experience included one year as a law professor, three years as a prosecutor, work in the public defender's office and private practice. Blanche testified that he spoke to Mrs. Berry on numerous occasions and informed her she would be an important witness. Blanche admitted that he did not subpoena witnesses for other phases of the trial. However, he talked to Mr. McCrossen, the banker; a psychologist; and two people from Baton Rouge with whom Berry had lived. Blanche interviewed a priest to whom he was referred by the "Southern Cities' Defense Committee" but decided not to use him as a witness because he was so "radical and wild-eyed" (Docket No. 83-K-2515, Vol. II, Tr. 486). Blanche did not know of any witnesses that could or would have helped the case.

CONTENTIONS IN APPLICATION FOR WRIT OF HABEAS CORPUS

Filed as an application for post conviction relief pursuant to Rule XXVII of the Rules of Supreme Court of Louisiana, and LSA-C.Cr.P. art. 924, et seq., the application sets forth six claims for relief, some of which contain several arguments. All arguments are considered, but they have been regrouped for this opinion.

CLAIM ONE—INEFFECTIVE ASSISTANCE OF COUNSEL

It is contended that attorney Blanche rendered ineffective assistance of counsel to defendant at trial of both guilt and penalty.

Argument One—Failure to Prepare

Defendant claims that Blanche failed to investigate and prepare for trial.

A. RUTH EAST

[1] A specific deviation is alleged with reference to Ruth East, who was known to the prosecution but not to attorney Blanche. East was outside the bank when the defendant fled the scene. According to her testimony at the habeas hearing, she would have testified that defendant appeared to be pale, in shock, like a "zombie" (sic), and walked strangely.

Attorney Blanche's failure to learn about this witness indicates a deficiency in investigation and preparation. However, no prejudice to the defendant has been shown. The description which East would have given is consistent with the appearance of a

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person who has committed a homicide and been shot in an exchange of gun fire. The defense argues that East's testimony "... would have substantially enhanced the Jury deliberations to such an extent that a lesser verdict would have been probable or a sentence of life, without benefit, more appropriate ... or conceivably returned a verdict of Not Guilty by reason of Insanity ...." (Docket No. 80-K-3818, Vol. I, Tr. 48) These contentions are unfounded. East's testimony does not suggest that her appearance would have had an impact on the jury favorable to the defendant, much less the dramatic effects suggested. Prejudice resulting from Blanche's failure to learn about East has not been shown.

B. FAILURE TO USE INDIGENT DEFENDER FUNDS

[4] There is a dispute about whether indigent defender funds were available to attorney Blanche for employing experts or investigators. Assuming, arguendo, that these funds were available, there is no showing that expert or lay witnesses could have been discovered who would have bolstered the defense.

Defendant has not shown any favorable evidence which counsel should have produced. *Fowler v. Parratt*, supra. Compare *United States v. Bayses*, supra.

Argument Two—Stipulations as to Chain of Evidence

[5] Attorney Blanche stipulated the chain of evidence (this apparently related to certain physical evidence including bullet pellets). Absent a flaw in the chain, an attorney cannot be criticized for stipulating to the chain of evidence and saving trial time. There is no showing here of such a flaw.

Argument Three—Film

[6] Defendant contends that attorney Blanche was ineffective in his opening statement, telling the jury he had discovered there was film of the episode at the bank. Blanche said:

"I found out today that there are films of what happened in the bank and if we can make them available to you, I'm going to try to do that. I think a film of the event, of course, would be perhaps more instructive than any witness could possibly be...." (Docket No. 80,080, Vol. II, proceedings Oct. 30, 1978, p. 17)

After making this statement, Blanche apparently discovered, according to Assistant District Attorney Leitz's new trial argument, that the film was not favorable to his client. Leitz said:

"... He viewed them and had ample opportunity to introduce them at trial and decided they were not in the best interest of his client...." (Docket No. 80,080, Vol. III, proceedings Nov. 30, 1978, p. 4)

This court has viewed the film and it would not have been helpful to defendant. It consists of a series of sequential photographs made by different bank cameras. The only picture of the actual shooting shows defendant Berry, gun in hand, pointing it at the failing victim.

Attorney Blanche used poor judgment in mentioning the film to the jury without having seen it, but he used good judgment in not showing it to the jury.

"A determination whether any given action or omission by counsel amounted to ineffective assistance cannot be divorced from consideration of the peculiar facts and circumstances that influenced counsel's judgment...." *United States v. Dennies*, 624 F.2d 190 at 200 (D.C., 1976).

No prejudice to the defendant has been shown.

Argument Four—Handwritten Stipulation

[7] Defendant argues that a handwritten stipulation admits that defendant fired first at the victim, Deputy Robert Cosbrea. This is not entirely accurate.

The handwritten stipulation was read to the jury by the trial judge, as follows:

"Alright, Ladies and Gentlemen of the Jury, I have before me a document which contains a stipulation to a set of facts agreed upon by the State and by the Defense Counsels. I'm going to read this to you and you're to accept these facts as

having been proven, the same as if they had been proven to your satisfaction on the witness stand. You understand?—O.K. 'First, that the defendant,' that's the defendant, Berry, 'went to the Metairie Bank on the morning of January 30th, 1978, with the intent of committing an armed robbery. Secondly, after entering the bank the defendant fired three shots, two of which struck and killed Deputy Robert Cochran. Thirdly, that Deputy Cochran did fire one shot with his service revolver which shot struck the defendant. And fourthly, a spent pellet was removed from the defendant and if Technician Ron Singer would testify, he would testify that the pellet recovered from the defendant was fired by Deputy Cochran's service revolver. And fifth and last, that the Detective recovered a spent 9 mm pellet from the defendant's home in Baton Rouge and Technician Singer would testify that pellet was fired by the same pistol which fired the pellet recovered from Deputy Cochran's body.' Now, you are to accept those five statements read by me just now as facts having been proven and established in the case. Do you all understand that"—O.K. Would you file this of record please. Make that 'Stipulation # 2' as title of the exhibit. Alright, who is your next witness?" (Docket No. 66,080, Vol. II, proceedings Oct. 25, 1978, pp. 66–67).

There is no indication of why defense counsel agreed to the stipulation. It is possible that the bank film was not introduced in evidence because of this stipulation. If the film was counsel's alternative, the stipulation was certainly the only competent choice.

One technique of criminal defense is to stipulate the worst features of a case rather than let the jury hear the evidence from live witnesses and prejudicial exhibits. The stipulation is an accurate representation of the facts of the event and does not, as defendant now contends, admit that defendant fired first. By entering the stipulation, attorney Blanche did not violate any duty to defendant. Further, there is no showing of prejudice.

Argument Five—Failure to Call Witnesses in Guilt Phase

[8] It is contended that attorney Blanche was ineffective in failing to call any witnesses other than defendant in the guilt phase of the trial.

There is no showing of witnesses who could have given testimony favorable to the defendant.[5] The trial judge summed up the case in ruling on the motion for new trial:

"The case you were faced with was a man who had a bullet from the dead deputy's gun removed from his body. He had several very credible eye witnesses pointing him out as the man who walked in the bank and shot the deputy. You had ballistic evidence connecting his gun with his apartment and the deputy's death. This was a chain of evidence that was insurmountable. You did what I consider to be the best thing you could do under the circumstances . . . and that was an attempt to getting a conviction of murder two rather than first degree murder. "You failed. The jury convicted him because of the impelling nature of the evidence, not because of your lack of diligence or ability as an attorney." (Docket No. 82-K-3515, Vol. I, Tr. 125–126)

Since there is no evidence of witnesses who could have helped the defense, no prejudice has been demonstrated.

Argument Six—Failure to Call Witnesses in Sentencing Phase

[9] Attorney Blanche testified that he interviewed several people concerning the sentencing phase of trial, including a priest, a psychologist, a medical doctor, a medical student, and Mrs. Carole Wunderlich in whose home Berry had lived. Attorney Blanche came to a reasonable conclusion that there were no witnesses who would be helpful to his client. While Mrs. Wunderlich would have testified that defendant was a good worker and a trusted friend, she would have had to admit that Berry smoked pot and had received an undesirable dis-

5. Ruth Kent's testimony has been considered earlier in this opinion.

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charge from military service. It is difficult to second guess a defense attorney on a decision not to call a witness who has some favorable things to say but would corroborate other unfavorable things.

Attorney Blanche did not fail in his duty by not calling Mrs. Wunderlich.

As to defendant's mother, Blanche allegedly erred when he attempted to call her to the stand during the sentencing phase and she did not testify. The implication is that the attorney was remiss in not preparing Mrs. Berry to testify. Blanche said he had advised the mother prior to trial that she would be a key witness on behalf of her son. At the habeas hearing, Mrs. Berry denied that the attorney had ever interviewed her as to defendant's family history or character and indicated she was too overcome with emotion to testify.

Blanche should have prepared the witness. Because of their conflicting testimony, it is not clear what was done. According to attorney Zainey, it was Berry who decided that his mother should not take the stand (undoubtedly because of her emotional state). When Mrs. Berry could not testify, Blanche did the next best thing and had her seated on the front row, where she sobbed under the observation of the jury.

In connection with Mrs. Berry, defendant has not carried the burden of showing that attorney Blanche breached a duty which prejudiced his defense.

CONCLUSION AS TO CLAIM I.

The charge of ineffectiveness against attorney Blanche has been thoroughly ventilated by the application and hearing. The arguments and supporting evidence are without merit either because there was no breach of duty or no prejudice was shown. Faced with a devastating case against his client, attorney Blanche gave defendant Berry reasonably competent representation in both the guilt and sentencing phases of the trial.

CLAIM II—NO LIST OF MITIGATING CIRCUMSTANCES TO JURORS

[10] Defendant contends that the jury was not furnished with a copy of the statutory aggravating and mitigating circumstances as required by LSA-C.Cr.P. art. 905.2.

Since the jurors copied certain aggravating circumstances on the verdict form, the only question is whether they received a written list of the mitigating circumstances during their deliberations. The record is ambivalent. The trial judge's remarks indicate that the jury was probably given an initial list of the statutory aggravating and mitigating circumstances and later furnished copies for each juror. Although there was no proof at the evidentiary hearing that this was done, the burden of proving that relief should be granted rests with defendant. LSA-C.Cr.P. art. 930.2. This claim is unsubstantiated and therefore without merit.

CLAIM III—SUPPRESSION OF EVIDENCE

[11] Defendant contends that the State suppressed exculpatory evidence in failing to produce witness East at the trial or disclose her knowledge to the defense. An assistant district attorney had interviewed East prior to trial. What Mrs. East knew was previously summarized in connection with the claim of ineffective counsel. Her testimony would not have been exculpatory. A wounded person leaving the scene of an attempted armed robbery would be expected to appear shocked and unsteady.

This claim lacks merit.

CLAIM IV: STATE SUPPRESSION OF FILM

[12] Defendant contends that the state withheld and suppressed favorable evidence, consisting of pictures made by the bank's cameras. Although not examined by the trial judge at the habeas corpus hearing, the still photographs have now been reviewed. None of the pictures are at all exculpatory.

This claim is without merit.

CLAIM V: CLOSING ARGUMENT OF THE STATE

Defendant contends that he was deprived of due process, equal protection and effec-

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tive assistance of counsel when the prosecutor alluded to appellate review of the sentence during closing argument.

[13, 14] Defense counsel's failure to object to the prosecutor's remarks is immaterial, since errors alleged in death cases are considered despite lack of objection. The finality of the death penalty outweighs procedural requirements during trial and appeal. *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980); *State v. Sonnier*, 379 So.2d 1286 (La., 1980); *State v. Faide*, supra.

[15] In connection with the original appeal, a per curiam denying rehearing previously considered this contention. In summary, the court held:

"Thus, the import of the closing argument was to tell the jury (1) that the statutory scheme, recognizing the seriousness of the consequences, provided adequate safeguards against arbitrary imposition of the death sentence, and (2) that weighing of all the considerations enumerated in the statute warranted imposition in this case. The argument did not serve to lessen the significance of the jury's role in the overall scheme." 391 So.2d 406 at 418.

In some other cases, for example, *State v. Lindsey*, 404 So.2d 466 (La., 1981), a death sentence has been reversed because speculation on a defendant's possible release from life imprisonment has been interjected into the jury's sentencing decision. However, *Lindsey* recognized a possible distinction between that case and *Berry*. See Footnote 18, 404 So.2d 466 at 487. In *State v. Willie*, 410 So.2d 1019 (La., 1982), the sentence was reversed because of argument covering the full gamut of appellate review in the United States.[4] Brief remarks concerning appellate review do not always require sentence reversal. See *State v. Moore*, 434 So.2d 340 (La., 1982) and *State v. Matthews*, 407 So.2d 1180 (La., 1981). As pointed out in the *Berry* per curiam, the issue must be determined in each individual case by considering references to appellate review in context.

The prior per curiam correctly analyzed and disposed of this issue.[5]

CLAIM VI—CONCESSION OF GUILT

[16] Defendant contends that he was deprived of due process, equal protection and effective counsel because of certain remarks in Blanche's opening argument to the jury, as follows:

"From the very beginning we will concede to you or I will concede to you on behalf of Ben Berry that he did intend to rob a branch of the Metairie Bank....

* * * * * *

"I'm not suggesting to you that he is innocent of a crime, but I'm asking you to presume, at least at this point, that he may be innocent of the crime of First Degree Murder." (Docket No. 96,080, Vol. II, proceedings Oct. 25, 1978, pp. 13, 17–18).

It is argued that Blanche admitted his client's guilt. This is incorrect. The first remark is a comment on an obvious and inescapable fact; counsel may have been trying to establish his candor with the jury. The second remark forms part of the theme

4. The author dissented from reversal of sentence in *State v. Willie*, supra.

5. In Blanche's own closing argument, he told the jurors, in summary: that Berry has some good in him; they should give him the opportunity to live; each should make an independent decision; life in prison would be a sufficiently horrible punishment; Berry is remorseful; he would remain in jail the rest of his life; they were not required to impose the death penalty; Berry is relatively young and not a career criminal; the death penalty should be reserved for such horrible crimes as mass murder; Berry and the victim exchanged shots; Berry will grieve forever for his crime; the crime happened quickly without deliberation; the victim cannot be restored to life; "[o]nly the slightest compassion is required" to oppose the death penalty; and that they should find some compassion for Berry. (Docket No. 96,080, Vol III, proceedings Oct. 26, 1978, p. 19).

State v. Myles, 389 So.2d 12 (La., 1980) held that a perfunctory closing argument in the sentencing phase of a death case amounted to ineffective assistance of counsel. In contrast to *Myles*, supra, Blanche's argument here did not fall below the standard of competency constitutionally required.

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of the opening statement: Berry, although culpable, was not guilty of *First Degree Murder*. Narrowing the presumption of innocence claim to the charge of first degree murder was intended to direct the jury toward a lesser verdict. Read in context these statements are not violations of the attorney's duty. *United States v. Decoster*, supra.

This claim lacks merit.

CONCLUSION

For the reasons assigned, the decision of the trial court denying the application for writ of habeas corpus is affirmed.

AFFIRMED.

CALOGERO, J., concurs and assigns reasons.

DENNIS, J., concurs with reasons.

CALOGERO, Justice, concurring.

I disagree with the majority's relying on the previous treatment (on appeal) of the issue concerning the prosecutor's closing argument to the jury and his references to appellate review. At that time, this Court had not yet taken a majority position that such arguments could ever require reversal of the sentence. It has only been since then, starting with *State v. Lindsey*, 404 So.2d 466 (La.1981), that a majority of this Court has determined that such arguments can require a reversal of the sentence because they inject arbitrary factors into the jury's considerations.[1]

However, after considering this case with those that have since been rendered, I am of the view that the instant case is more on point with those not requiring reversal than with those in which it was deemed necessary to reverse the sentence. I therefore concur.

1. *See, State v. Sawyer*, 422 So.2d 96 (La.1982); *State v. Robinson*, 421 So.2d 228 (La.1982); *State v. Jordan*, 420 So.2d 420 (La.1982); *State v. Brown*, 414 So.2d 689 (La.1982); *State v. Moore*, 414 So.2d 340 (La.1982); *State v. Wilkins*, 410 So.2d 1013 (La.1982); and *State v. Williams*, 397 So.2d 1256 (La.1981).

DENNIS, Justice, concurring.

I agree with the majority's result, but the opinion leaves room for misimpression concerning the application of the proper standards for evaluating ineffective assistance of counsel claims in capital cases.

The majority opinion appears to utilize the two-pronged test of *McQueen v. Swenson*, 498 F.2d 207 (8th Cir.1974) to dispose of all of the claims presented by this petitioner, regardless of whether they relate to lack of trial preparation or to substandard conduct during the guilt and penalty phases of the trial. The *McQueen* test is appropriate for use in resolving those claims of ineffective assistance grounded in lack of trial preparation, but the second prong of the *McQueen* test, particularly as applied in the majority opinion, represents too stringent a burden to be placed fairly upon a defendant for other types of ineffective assistance of counsel claims.

As the majority acknowledges, in the penalty phase of a capital case we have previously held that the standard to be applied is that of a reasonably competent attorney acting as a diligent, conscientious advocate for the defendant's life. *State v. Myles*, 389 So.2d 12, 28 (La.1979). The majority's statement that "the initial burden of proof is on the defendant, but once met, he is entitled to a new trial unless the court can say beyond a reasonable doubt the error was harmless," is a better expression of the proper application of the burden of showing prejudice for claims of ineffective assistance of counsel, other than for those involving preparation for trial.

It is unclear from the majority opinion which test is applied to each claim of ineffective assistance. Nevertheless, when the correct standards are applied to the evidence in this case, I conclude that Benjamin Berry marginally received the reasonably competent assistance of an attorney acting as a diligent, conscientious advocate for his life. Therefore, I respectfully concur.

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APPENDIX "C"

DECISION OF LOUISIANA SUPREME COURT,
DATED SEPTEMBER 4, 1980 AFFIRMING PETITIONER'S
ORIGINAL CONVICTION AND SENTENCE REPORTED IN
391 So.2d 406
(CONSISTING OF 16 PAGES NUMBERED
81 THRU 96)

c. sell, transfer, assign, convey, lease, sublet, Mortgage or otherwise dispose of or deal with all or any part of the property except as otherwise agreed among the Partners."

In fact, only Claiter could so bind the partnership. Art. 10 concludes:

"The Partners in Commendam shall not participate in the management or control of the Partnership's business, nor shall they transact any business for the Partnership, said powers being vested solely and exclusively in the General Partner."

Juban and the Court accepted this stipulation and proceeded without adding the partnership as a defendant. Having induced such reliance, the partnership cannot now be heard to repudiate the stipulation.

STATE of Louisiana

v.

Benjamin A. BERRY.

No. 66068.

Supreme Court of Louisiana.

Sept. 4, 1980.

On Rehearing Nov. 28, 1980.

Dissenting Opinion Dec. 19, 1980.

Defendant was convicted on a jury verdict before the 24th Judicial District Court, Parish of Jefferson, Frank V. Zaccaria, J., of first-degree murder and was sentenced to death, and he appealed. The Supreme Court, Calogero, J., held that: (1) statute which permits State to exclude jurors who oppose the death penalty without a showing that such opposition would interfere with their ability to determine guilt or innocence, under bifurcated scheme in which jury would consider evidence at sentencing portion relating to aggravating and mitigating circumstances which would not be admissible in the guilt phase, did not unconstitutionally subordinate determination of impartiality as to issue of innocence or guilt in bifurcated trials; (2) trial court did not err in refusing to appoint sanity commission and in denying motions for sequestered jury venire and individual voir dire; (3) victim was a peace officer engaged in his lawful duties at the time of the shooting; (4) statutory scheme which permits State to make both closing argument and rebuttal at sentencing hearing, while defense makes only one argument, is not constitutionally deficient; (5) State's closing argument was not so inflammatory and misleading as to deny defendant a fair hearing from jury during sentencing phase; (6) defense counsel properly pursued issues which would mitigate and reduce the verdict; and (7) sentence of death was not disproportionate to penalty imposed in similar cases.

Affirmed.

Dennis, J., dissented.

Calogero, Fedoroff and Dennis, JJ., would grant rehearing.

Calogero, J., filed opinion dissenting to denial of rehearing.

1. Jury ⇐34

Statute which permits State to exclude jurors who oppose death penalty without showing that such opposition would interfere with their ability to determine guilt or innocence, under bifurcated scheme in which jury would consider evidence at sentencing phase relating to certain aggravating and mitigating circumstances which would not be admissible in guilt phase did not unconstitutionally subordinate determination of impartiality as to issue of innocence or guilt in bifurcated trials. LSA-C.Cr.P. arts. 798, 798(2).

2. Criminal Law ⇐1178

Supreme Court would review merits of defendant's assignments of error, even though they were neither briefed nor argued, because of capital nature of the case.

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5. Criminal Law ⇐625

Trial court is granted considerable discretion in determining if defendant should be afforded mental examination to determine his mental capacity to proceed. LSA-C.Cr.P. art. 648.

4. Mental Health ⇐434

Trial judge, which called recess, had defendant examined by psychiatrist, and allowed testimony from doctor to effect that there was no evidence of any mental disorder, did not abuse his discretion in refusing to appoint sanity commission and to grant sanity hearing. LSA-C.Cr.P. art. 648.

5. Jury ⇐131(12)

Supreme Court could not say that trial court erred in denying motion for sequestered jury venire and individual voir dire filed by defendant, who did not allege in any assignment of error or in argument that prejudicial conduct occurred or show in the record how denial of the motions actually caused prejudice. LSA-C.Cr.P. art. 784.

6. Jury ⇐33(5)

Without showing of systematic exclusion of blacks, state is entitled to exercise its peremptory challenges as it chooses.

7. Jury ⇐33(1)

Trial court did not err in denying motion for mistrial filed by defendant, who did not show systematic exclusion of blacks from the jury.

8. Homicide ⇐300(1)

In prosecution for first-degree murder, based on offense which occurred during period wherein Supreme Court recognized that presence of aggravating circumstances is essential element of crime of first-degree murder under 1977 statutory scheme, trial court correctly charged jury that conviction for first-degree murder required finding of less of four aggravating circumstances. LSA-R.S. 14:30.

9. Homicide ⇐23(1)

In prosecution for first-degree murder, his offense which occurred during period wherein Supreme Court recognized that presence of aggravating circumstance was essential element of crime of first-degree murder under 1977 statutory scheme, whether victim was peace officer engaged in performance of his lawful duties was issue in both guilt phase and sentencing phase of the bifurcated trial. LSA-R.S. 14:30.

10. Sheriffs and Constables ⇐86

Armed deputy sheriff who was wearing his regular uniform at bank during normal banking hours at time he was fatally wounded by defendant and had volunteered for this detail, drawing extra pay from the bank, was acting within scope of his lawful duties as a deputy sheriff when he tried to prevent armed robbery in his presence. LSA-R.S. 14:30.

11. Sheriffs and Constables ⇐79

Deputy sheriff who was being paid to station himself at bank as security guard during his normal off-duty time, duty or job which he was not already required to perform, was not engaged in type of prescribed "services of a law enforcement nature" contemplated by statute making it illegal for deputy sheriff to enter into contract to perform services of such nature. LSA-R.S. 14:140(3).

12. Criminal Law ⇐978

Statutory scheme which permits state to make both closing argument and rebuttal at sentencing hearing, while defense makes only one argument, is not constitutionally deficient. LSA-C.Cr.P. art. 905.2.

13. Criminal Law ⇐966.5(1)

In prosecution for first-degree murder, prosecutor's reference during sentencing phase to defendant's previous convictions, dishonorable military discharge, and membership in a motorcycle club, all of which had been introduced into evidence at trial and related to defendant's background, was not improper. LSA-R.S. 14:30.

14. Criminal Law ⇐1177

In prosecution for first-degree murder, wherein jury returned verdict recommending death penalty based upon finding that defendant had killed peace officer engaged in his lawful duties at the time he was shot,

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that the murder was committed during attempt to commit armed robbery, and that defendant created risk of death or great bodily injury to several other persons who were either in the bank as customers or working there as tellers, prosecution's closing argument during sentencing phase did not likely influence jury in its determination and therefore no substantial violation of defendant's rights occurred warranting reversal of his sentence. LSA-C.Cr.P. art. 921; LSA-R.S. 14:30.

16. Criminal Law ⇐1037.1(1)

In prosecution for first-degree murder, prosecution's rebuttal argument, to which defendant did not object, fairly directed itself toward rebutting defense argument, although it admittedly was more comprehensive than State's opening argument, and did not constitute reversible error. LSA-C.Cr.P. art. 774; LSA-R.S. 14:30.

14. Criminal Law ⇐641.13(6)

In prosecution for first-degree murder, defense counsel, which cross-examined State's witnesses in detail regarding offense and emphasized inconsistency or uncertainty on the part of witnesses, properly pursued issue which would mitigate and reduce the verdict. LSA-R.S. 14:30.

17. Criminal Law ⇐723(1)

In prosecution for first-degree murder, although State's remarks in closing argument bordered on impropriety, they were not of such a nature as to arouse jurors' passion and inject arbitrary factor into determination to impose death sentence. LSA-R.S. 14:30.

15. Homicide ⇐354

In prosecution for first-degree murder wherein sentence of death was imposed, evidence clearly supported jury's finding of three aggravating circumstances, including fact that murder was committed during attempted perpetration of armed robbery, that victim was peace officer engaged in his lawful duties, and that defendant knowingly created risk of death or great bodily harm to more than one person. LSA-R.S. 14:30.

19. Criminal Law ⇐1206(2).

Information contained in sentence investigation report, together with other factors, is to be considered in Supreme Court's determination of whether death sentence is disproportionate to penalty imposed in similar cases, considering both crime and defendant.

20. Criminal Law ⇐1206(2)

In prosecution for first-degree murder, wherein jury found that murder was committed during attempted perpetration of armed robbery, that victim was peace officer engaged in his lawful duties, and that defendant knowingly created risk of death or great bodily harm to more than one person, and wherein pertaining investigation report showed that defendant had history of drug abuse and criminal history consisting of four prior arrests for nonviolent offenses with a conviction for simple burglary, and had received undesirable discharge from armed services, death sentence was not disproportionate to penalty imposed in similar cases, considering both crime and defendant. LSA-R.S. 14:30.

On Application for Rehearing

21. Criminal Law ⇐723(1)

When prosecutor's reference to appellate review of death sentence conveys message that jurors' awesome responsibility is lessened by fact that their decision is not the final one, or if reference contains inaccurate or misleading information, then defendant has not had a fair trial in sentencing phase, and penalty should be vacated. LSA-C.Cr.P. art. 905.9.

22. Criminal Law ⇐723(1)

There is no absolute prohibition against prosecutor's reference in closing argument to commonly known fact that capital sentencing statute requires Supreme Court to review every death sentence, and such a reference does not necessarily serve to induce a juror to discard his responsibility, and thus issue should be determined in each individual case by viewing reference to appellate review in context in which remark was made. LSA-C.Cr.P. art. 905.9.

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(This ca. La., 331 So.2d 489)

28. Criminal Law ⇐723(1)

Prosecutor's closing argument, which told jury that statutory death penalty scheme, provided adequate safeguards against arbitrary imposition of death sentences, and that weighing of all considerations enumerated in statute warranted imposition of death penalty in instant case, did not serve to lessen significance of jury's role in overall scheme, and thus prosecutor's reference in closing to fact that capital sentencing statute requires Supreme Court to review every death sentence did not require reversal. LSA-C.Cr.P. arts. 905.4, 905.5.

William J. Guste, Jr., Atty. Gen., Barbara Bethedge, Asst. Atty. Gen., John M. Mamoulides, Dist. Atty., Abbott J. Reeves, Patrick C. Loitz, Asst. Dist. Attys., Gretna, for plaintiff-appellee.

Fred A. Blanche, III, Baton Rouge, for defendant-appellant.

Richard Shapiro, New Orleans, for amicus curiae-Southern Prisoners Defense Committee.

CALOGERO, Justice.*

Benjamin A. Berry was charged by grand jury indictment with the crime of first degree murder, in violation of R.S. 14:30. Following the trial, the twelve member jury returned a unanimous verdict of guilty as charged. Thereafter, the second phase of the bifurcated trial was held to determine whether the death penalty should be imposed. The jury unanimously recommended the death sentence. Defendant appeals on the basis of ten assignments of error grouped into three arguments. For the reasons which follow we affirm the conviction and sentence.

The trial revealed the following facts concerning the offense. On January 30, 1978, Benjamin Berry and one David Pennington decided to rob the Metairie Road branch of the Metairie Bank and Trust Company. The pair drove from their apartment in Baton Rouge to the bank in Jefferson Parish. They arrived at approximately 10:00 a. m. Pennington entered the bank alone to look around, more specifically to see if the tellers had much cash. Pennington returned to the truck where the defendant was waiting and advised him of his findings. It is disputed whether or not Pennington told defendant that there was an armed guard inside the bank. Defendant contends that Pennington did not so inform him, but Officer Lamia testified that defendant had made a statement and told him that he did know there was an armed guard in the bank before he entered. In any event Berry decided to proceed with the robbery. While Pennington waited in the truck, Berry entered the bank, with seven to ten customers inside, with his fifteen round, nine millimeter, "automatic" pistol drawn. The guard, a Jefferson Parish Sheriff's Deputy working a paid security detail, exchanged fire with defendant and was fatally wounded. Berry fired three shots, two hit the officer and one hit the wall about three feet above the floor. The officer fired one shot wounding Berry. Defendant immediately fled from the bank after the shooting and the pair returned to Baton Rouge. Berry was later arrested after entering a Baton Rouge hospital for treatment. Berry was charged with first degree murder. At the trial, Berry argued that he did not have the requisite intent to kill the victim but rather that he shot impulsively in self defense, after being fired upon. The state countered this argument by introducing testimony to the effect that Berry shot first and also fired the fatal shot at close range after the victim had dropped his gun upon first being hit.[1]

*The Honorable Gerald P. Fedoroff participated in this decision as an Associate Justice Ad Hoc in place of Associate Justice Fred A. Blanche, Jr., who was recused.

[1] The jury apparently believed the state's version of the facts, finding that Berry did intentionally shoot the deputy sheriff, since they returned a guilty verdict and since "intent to kill or commit great bodily harm" is an element of the crime of first degree murder. From our own review of the record, we find that the evidence supports this finding by the jury.

ASSIGNMENTS OF ERROR NOS. 1 AND 5

By these assignments defendant contends that the trial court erred in failing to quash the indictment. He claims that the indictment fails to charge an offense punishable under a valid statute. In brief he does not explain the thrust of these assignments. He does not attack the constitutionality of the first degree murder statute. Rather, the entirety of his argument in brief under these assignments is that the jury challenges allowed the state under C.Cr.P. art. 798 fail to meet the constitutional requirements set out in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). We will therefore consider that argument.

C.Cr.P. art. 798 provides:

"It is good cause for challenge on the part of the state, but not on the part of the defendant, that:

(1) The juror is biased against the enforcement of the statute charged to have been violated, or is of the fixed opinion that the statute is invalid or unconstitutional;

(2) The juror tendered in a capital case who has conscientious scruples against the infliction of capital punishment and makes it unmistakably clear (a) that he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him, or (b) that his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt; or

(3) The juror would not convict upon circumstantial evidence."

Defendant urges that § 2 of the above article denies the accused a fair trial by allowing the state to select a jury composed of members who are unlikely to recommend mercy. Defendant argues that it is unconstitutional to allow the state to exclude jurors who oppose the death penalty without a showing that such opposition would interfere with their ability to determine guilt or innocence. Defendant believes that the statute's emphasis on the ability of the juror to impose the death penalty improperly subordinates the determination of impartiality as to the issue of innocence or guilt in bifurcated trials.[1]

Defendant's challenge to the *Witherspoon* based jury selection in bifurcated trials has recently been considered by this Court in *State v. Williams*, 392 So.2d 619, (La.1980). In *Williams*, this Court rejected the contention that the bifurcated trial affects the validity of the *Witherspoon* rationale. Since a rehearing has been granted in *Williams*, we shall readdress the issue here.

In *Witherspoon* defendant challenged the exclusion of jurors who indicated that they had reservations about sentencing a man to death. The petitioner therein maintained that such a jury, unlike one fully chosen at random from a cross-section of the community, must necessarily be biased in favor of conviction, for the kind of juror who would be unperturbed by the prospect of sending a man to death is the kind of juror who would too readily ignore the presumption of a defendant's innocence, accept the prosecution's version of the facts, and return a verdict of guilty. To support this view, petitioner Witherspoon cited several studies which he felt demonstrated the partiality of death-qualified jurors toward the prosecution on the issue of guilt or innocence. The Supreme Court rejected petitioner's argument, stating as follows:

"The data adduced by the petitioner, however, are too tentative and fragmen-

1. C.Cr.P. art. 800 provides that the defendant has no cause for complaining that the state was erroneously allowed a challenge for cause (a *Witherspoon* challenge) unless the state has used all of its peremptory challenges, such that the effect of the erroneous ruling is to allow the state more peremptory challenges than it is entitled to by law. Although the trial court only counted seven peremptory challenges by the state, which would render defendant's argument here moot, we have noted twelve such challenges in the record and therefore find that defendant would have cause for complaint if the state had been erroneously allowed a challenge for cause.

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tary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt. We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. In light of the presently available information, we are not prepared to announce a per se constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was." 88 S.Ct. at 1776-1775.

[2] In the instant case, defendant contends that *Witherspoon* is not dispositive of his claims since the Court there was not presented with a bifurcated trial proceeding. However, this distinction makes little if any difference in result. In *Witherspoon*, the same jury which decided the question of defendant's guilt also was called upon to recommend sentence. The only significant change under the present bifurcated scheme is the consideration by the jury of additional evidence at the sentencing portion of the trial relating to certain aggravating and mitigating circumstances which would not be admissible in the guilt phase. The question herein as to the representativeness of the jury at trial on the issue of guilt appears to be precisely the same as that raised by the petitioner in *Witherspoon*. Thus we find defendant's argument to be without merit.

ASSIGNMENTS OF ERROR NOS. 2, 3, AND 4

[3] These assignments of error were neither briefed nor argued before this Court. While assignments of error neither briefed nor argued are generally considered abandoned, *State v. Sonnier*, 379 So.2d 1236 (La.1979); *State v. Wientjes*, 341 So.2d 360 (La.1976); and *State v. Phillips*, 327 So.2d 1187 (La.1976), we will review the merits of these assignments of error, because of the capital nature of the case. *State v. Jones*, 332 So.2d 466 (La.1976).

[3, 4] Defendant contends that the trial court erred by refusing to appoint a sanity commission and to grant a sanity hearing. The trial court is granted considerable discretion in determining if defendant should be afforded a mental examination to determine defendant's mental capacity to proceed. C.Cr.P. art. 643; and *State v. Clark*, 367 So.2d 311 (La.1979). Here the trial judge called a recess, had defendant examined by a psychiatrist, and allowed testimony from the doctor which was to the effect that there was no evidence of any mental disorder. There is no indication that the trial judge abused his discretion here.

[5] Defendant also contends that the trial court erred in denying his motion for a sequestered jury venire and individual voir dire. C.Cr.P. art. 784 grants the trial court discretion in determining whether jurors should be called singly or in groups. Defendant does not allege in any assignment of error that any prejudicial conduct occurred because of the unsequestered voir dire. The record does not show how the denial of the motion actually caused prejudice to defendant and no prejudice has been alleged in argument. Therefore, we can not say that the denial of the motion was error.

[6, 7] Finally, defendant contends that the trial court erred in denying his motion for a mistrial because blacks were systematically excluded. Without such a showing of systematic exclusion of blacks, the state is entitled to exercise its peremptory challenges as it chooses. *State v. Albert*, 381 So.2d 434 (La.1980), No. 65,765; and *State v. Allen*, 380 So.2d 28 (La.1980).

Therefore, we find that none of these assignments of error present reversible error.

ASSIGNMENT OF ERROR NO. 6

By this assignment of error defendant contends that the trial court erred in failing to instruct the jury that, as a matter of law, the victim was not a peace officer engaged in his lawful duties at the time of the shooting. Defendant requested a special

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jury charge on this issue and the request was denied. This assignment relates to both the guilt phase of the trial and the sentencing phase.

[8, 9] The first degree murder statute in effect at the time of the offense provided as follows:

"First degree murder is the killing of a human being: when the offender has a specific intent to kill or inflict great bodily harm."

However, the instant offense occurred during the effective period of *State v. Payton*, 361 So.2d 886 (La.1978), wherein this Court recognized that the presence of aggravating circumstances is an essential element of the crime of first degree murder under Louisiana's 1977 statutory scheme. Thus, the trial court correctly charged the jury that a conviction for first degree murder required a finding of one of four aggravating circumstances: (1) the murder was committed in the course of aggravated rape, aggravated kidnapping, aggravated burglary, armed robbery, or attempts to commit these crimes; (2) the murder of a fireman or peace officer engaged in his lawful duties; (3) murder by which the offender knowingly created risk of death or great bodily harm to more than one person; or (4) murder committed for remuneration. Therefore, the question of whether the victim was a peace officer engaged in the performance of his lawful duties was an issue in both phases of the bifurcated trial.

The victim was a Jefferson Parish Sheriff's Deputy wearing his regular Deputy Sheriff's uniform and on guard duty, a security detail, at the bank during normal banking hours at the time of the offense. He, just as other deputy sheriffs often do, had volunteered for this detail, drawing extra pay from the bank. It might be said that he was "moonlighting." He was killed by defendant because he was an armed deputy whose presence was a threat to defendant's bank robbery mission, and his death came during an effort to prevent defendant's successful commission of a serious felony.

[10] Whatever the nature of the deputy's general activities at the bank in the context of the question whether he was engaged in his lawful duties—it was surely within the scope of his lawful duties as a deputy sheriff for him to try to prevent an armed robbery in his presence.[3]

Therefore, we conclude that the the trial judge did not err in refusing defendant's request to charge the jury that the victim was not a peace officer engaged in his lawful duties.

The amicus brief raises an interesting argument in connection with this issue. Therein it is argued that R.S. 14:140(3), a statute defining public contract fraud, indicates that a police officer on private detail does not come within the definition of "a peace officer engaged in his lawful duties" under C.Cr.P. art. 905.4(b).

R.S. 14:140(3) defines public contract fraud as follows:

"When any sheriff or deputy sheriff charged with the duties of enforcing the laws of this state or any political subdivision thereof shall enter into a contract, either written or oral, individually or as a member or stockholder or any partnership, company or corporation with any such person whereby such sheriff or deputy sheriff or partnership, company or corporation of which he is a member or stockholder is to perform any services of a law enforcement nature."

It is argued that since R.S. 14:140(3) makes it illegal for a deputy sheriff to enter into a contract to perform services of a law enforcement nature that Deputy Cochran necessarily was not "engaged in his lawful duties." We disagree with this analysis.

[11] R.S. 14:140(3) was enacted to prevent a sheriff or deputy sheriff from forcing a person to pay money for the services

3. Under a similar fact situation, where a deputy sheriff was on duty as an apartment security guard, this Court held that a parish sheriff's deputy on such duty is considered as an on duty member of the law enforcement agency for the purposes of protecting a defendant's Fourth Amendment rights. *State v. Wilkerson*, 387 So.2d 519 (La.1979).

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that the officers were already required to perform by their employment as law enforcement officers. In other words, a deputy sheriff could not require a bank to pay him for answering a robbery call, a duty he is already required to perform by his very employment as a deputy sheriff. In the case at bar, Deputy Cochran was being paid to station himself at the bank as a security guard during his normal off duty time, in the bank, a duty or job which he was not already required to perform. There is nothing unlawful about the arrangement Deputy Cochran had with the bank. The bank contacted the Sheriff's Department about obtaining someone for the position, the Sheriff's Department assigned the officer to the job, and the whole arrangement was quite legal.

The deputy's presence and general activity at the bank—on a paid detail—is not the type of proscribed "services of a law enforcement nature" contemplated by R.S. 14:140(3).

The amicus argument is without merit.

ASSIGNMENT OF ERROR NO. 7

[12] By this assignment of error defendant alleges that the trial court erred in allowing the state to argue to the jury twice during the sentencing phase of the bifurcated trial and the defense only once.

C.Cr.P. art. 905.2, regarding the sentencing phase of the bifurcated trial, provides in pertinent part:

"Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure."

The applicable code article, C.Cr.P. art. 765(5), provides that the normal order of trial shall allow closing arguments by the state, the defense and the state in rebuttal.

At the sentencing hearing the state made its closing argument, the defense made its argument and then the state made a rebuttal argument, following the statutorily prescribed procedure as set out above.

In the amicus brief it is argued that the Georgia capital sentencing scheme, upon which the Louisiana statute is modeled, supports defendant's argument. In Georgia, the defendant's closing argument is the last presentation to the jury before it commences deliberations on whether to impose the death penalty. In Georgia, this order of closing argument at the sentencing hearing is statutorily prescribed. Ga.Code Ann. § 27-2503. In Louisiana, as stated above, it is statutorily provided that the state have the final argument. While it may be that a different system is to be preferred, the present system is not constitutionally deficient and any change addresses itself to the legislature.

This assignment of error is, therefore, without merit.

ASSIGNMENTS OF ERROR NOS. 8 AND 9

Defendant contends that the trial judge erred when he denied the defense motion for a mistrial (Assignment of Error No. 8) and motion for a new trial (Assignment of Error No. 9), each founded on the contention that the state's closing argument in chief, during the sentencing phase of the bifurcated trial, was so inflammatory and misleading as to deny the defendant a fair hearing from the jury.

The portion of the argument which preceded a defense objection was as follows:

"Ladies and gentlemen of the jury, you have heard all of the evidence, you heard all of the aggravating circumstances. All Mr. Blanche has asked so far is to have compassion ... to have compassion on Benjamin Berry.

"I ask you what compassion did Benjamin Berry have on the wife and children of Robert Cochran? What compassion does a man have who arms himself with a 15 round gun in order to protect himself from one motorcycle club, one motorcycle gang against another? What compassion does this kind of man have? Yet he stands here asking for your compassion. Give me a break. I'm a murderer, but give me a break.

"Certainly, ladies and gentlemen, he's a murderer. A man lies dead in his grave because Benjamin Berry decided he, he was going to be God Almighty."

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The trial judge overruled defendant's objection (that the argument was inflammatory) with the observation that "This is closing argument."

The prosecutor thereafter continued:

"It's a burden. It's a burden for you people to be here representing people of the State of Louisiana, but it's time, ladies and gentlemen--It's time to put to death the people who run our streets, make them unsafe for us to live in, make this a jungle.

"Put him to death. We must be able to go into our houses again at night. Let's be able to go to the bank at 10:00 in the morning and do our banking business. Let's take fear, let's erase fear from the people in this country, and the people in the State of Louisiana.

"We don't have one aggravating circumstance in this. We got (sic) four. He was perpetrating an armed robbery. He was going to kill anybody that got in his way. He killed a policeman with a family in the line of his duty. He put other people, ordinary people, not policemen but ordinary people, people just like you, in danger of death. He executed the man in a cruel and heinous way. And, he stands here asking for your compassion.

"The time for compassion is over. We can go about this world giving everybody compassion but, yet, we have to live in a jungle to survive.

"Do you want to have to walk out your house every day of your life and carry a gun to protect yourself against the Benjamin Berrys of the world?

"The time for softness and the time for compassion is over. It is time for action. And the only action we can bring forth is the death penalty. It's provided for in our law and it's provided for in our law as a detriment against crime. Let the Benjamin Berrys walk through this world knowing they can't do what Benjamin Berry did.

"It's time, ladies and gentlemen. It's time. The free ride for criminals is over. It's gone. It's time for you, citizens of the State of Louisiana, of the United States of America, to step forward, to say there's a time for justice. It's a time we must be firm. We don't want to live in a country with insurrection.

"Ladies and gentlemen, it's not an easy decision but it is one I have to ask you. Each and every one of you on voir dire, which Mr. Blanche said was the time to tell the truth, were asked, 'Could you, if the circumstances were prevented--presented--to you, could you come back with a death penalty?'

"I can't conceive of no (sic) greater case in this world than this one right here where the facts warrant the death penalty. We have a man who was previously convicted, admitted that from the stand, has been thrown out of the armed services, who's a member of a motorcycle gang. What has he done for society except cause turmoil, except to make this a dangerous place for you to live, for your children to live.

"It's time, ladies and gentlemen. It's time. It's time for the people of the world ... the good people, to stand up and be counted.

"I would ask you to come back with the death verdict."

No objection was made to the foregoing portion of the argument. However, after defense argument, state rebuttal argument, the jury instruction and retiring of the jury for deliberation, defense counsel moved for a mistrial contending that the state's argument during the sentencing phase was so inflammatory as to deny defendant a fair trial from the jury.

The trial judge denied the motion.

[13] The portion of the argument to which specific objection was made, reference to defendant's previous conviction, dishonorable military discharge and membership in a motorcycle club, was not improper. All had been introduced into evidence at trial and related to defendant's background, a relevant consideration in the context of defendant's argument for compassion.

Defendant's motion for a mistrial came after the jury had been retired, so that the

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trial judge had no opportunity to admonish the jury and/or counsel the prosecutor on further impermissible argument. Ordinarily we might find the issue not preserved. But because this is a capital case and particularly because this Court has an obligation to examine the record for passion, prejudice or arbitrary factors which may have contributed to the jury's recommendation in favor of the death penalty (*See* Rule 28 and *State v. Sonnier*, 379 So.2d 1326 (La.1980), on rehearing at 1368) we feel compelled to scrutinize the prosecutor's argument for possible reversible error.

C.Cr.P. art. 774 provides that argument shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case, and further that the argument shall not appeal to prejudice. C.Cr.P. art. 905.2 provides that the procedure in the sentencing phase of the bifurcated trial shall be the same as that provided for the guilt phase in the Code of Criminal Procedure, making C.Cr.P. art. 774 applicable to the sentencing hearing.

The closest the state's argument came to impermissibility was where the district attorney suggested to the jury that they, as well as other citizens, were exposed to threats upon their safety by people like the defendant Benjamin Berry. While it could be argued that these statements were conclusions to be drawn from the evidence (i. e. the likelihood that Berry would again commit a crime since he is a repeat offender) it is more likely that this was an attempt by the state to appeal to the jurors' prejudices and fears.

This Court has in several cases opined that arguments which appeal to emotions and fears of jury members are improper: *State v. Hayes*, 364 So.2d 988 (La.1978) where the state attempted to turn jury deliberations into a plebiscite on crime and criminals and predicted dire consequences to society as a whole if leniency were to be shown; *State v. Lee*, 340 So.2d 190 (La. 1976) where the prosecutor urged the jury to consider the danger to their families if defendant was acquitted; and *State v. Williams*, 345 So.2d 181 (La.1977) where the district attorney pointed to several of the jurors and argued that the crime could have been committed on any one of them.

In none of the three cited cases however, did we reverse based upon the improper argument, which appealed to prejudice. While it was held that the argument was improper and such arguments were by no means to be encouraged, it was also held that the arguments were not so prejudicial as to warrant a reversal.[6] In *State v. Lee*, *supra*, this Court held that "before a verdict approved by the judge is set aside on the ground of improper argument, this Court must be thoroughly convinced that the jury was influenced by the remarks, and that they contributed to the verdict." *See also* C.Cr.P. art. 921.

[14] In the present case, the jury returned its verdict based upon the finding of three aggravating circumstances: (1) that Berry had killed a peace officer who was engaged in his lawful duties at the time he was shot; (2) that the murder was committed during an attempt to commit an armed robbery; and (3) that the defendant created a risk of death or great bodily injury to several other persons who were either in the bank as customers or working there as tellers. All three findings are adequately supported by the evidence (as discussed elsewhere in this opinion). In the overall context of this case, considering all the evidence, including defendant's admission that it was his idea to commit the armed robbery, that a deputy sheriff was intentionally killed during the armed robbery, that several other people's lives were endangered, the minimal mitigating factors and the full arguments of both the state and the defense, we are simply not convinced that the jury was influenced by the remarks. In fact in our view, more likely than not, the argument did not influence the jury in its determination to recommend the death penalty. Accordingly, we do not agree with

6. *State v. Hayes*, *supra*, was reversed, but on different grounds than concern us here.

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the defendant that a substantial violation of his rights has occurred warranting a reversal of his sentence. C.Cr.P. art. 921.

[15] In defendant's supplemental brief in connection with this argument, that the state's closing argument was inflammatory and impermissible, there is presented the further contention that the state's rebuttal argument in the sentencing phase of trial was not confined to answering the argument of defendant as required by C.Cr.P. art. 774 but rather was a comprehensive review of the facts proving aggravation. The argument is without reversible merit for two reasons. Defendant did not object. And the rebuttal argument, admittedly more comprehensive than the state's opening argument, fairly directed itself toward rebutting the defense argument. Defendant had argued that mitigating circumstances were sufficient to offset such aggravating circumstances as were in fact proven; the prosecution took issue with that and harped on the full extent to which those circumstances were aggravated, and in fact proven.

These assignments of error are, therefore, without merit.

ASSIGNMENT OF ERROR NO. 10

By this assignment of error defendant argues that he should have been granted a new trial because of tactical errors by defense counsel which deprived defendant of a fair trial. Counsel argues that he failed to present a coherent picture of the offense to the jury. Such allegations are not supported by the record.

[16] Defense counsel cross-examined state's witnesses in detail regarding the offense and emphasized inconsistency or uncertainty on the part of the witnesses. Due to the great weight of the evidence against defendant, counsel properly pursued issues which would mitigate and reduce the verdict. The trial court found no merit in this argument due to counsel's competent performance at trial and we find no indication that the trial court abused its discretion in this ruling.

This assignment of error is without merit.

SENTENCE REVIEW

Under C.Cr.P. art. 905.9 this Court is required to review every sentence of death for excessiveness. That article mandates that this Court "establish such procedures as are necessary to satisfy constitutional criteria for review."

"Every sentence of death shall be reviewed by this Court to determine if it is excessive. In determining whether the sentence is excessive the Court shall determine:

(a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and

(b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

(c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

These sentence review guidelines are the same as those authorized by the Georgia statute and approved by the United States Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d (1976).

[17] We have reviewed the entire record and have not found any indication that the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors. Both the defendant and the victim were white, members of defendant's race were represented on the jury, and race was not an issue at the trial. While the state's remarks in closing argument bordered on impropriety, as discussed herein, we do not find that they were of such a nature as to arouse the jurors' passion and inject an arbitrary factor into the sentencing determination.

The jury found three aggravating circumstances:

(a) that the murder was committed during the attempted perpetration of an armed robbery;

(b) that the victim was a peace officer engaged in his lawful duties; and

(c) that the offender knowingly created a risk of death or great bodily harm to more than one person.

[18] The evidence clearly supports all three findings. Defendant admitted at trial that he entered the bank with his gun drawn intending to rob the bank. There was uncontested evidence that the victim was a uniformed Jefferson Parish Sheriff's Deputy attempting to prevent a felony at the time he was shot (*See* Assignment of Error No. 6 above). And finally, there is testimony that there were seven to ten customers in the bank when the defendant entered the bank with his fifteen round "automatic" pistol drawn. Several of the customers, who had to duck, were in close proximity to the deputy when defendant fired three shots at him. The defendant himself testified, although perhaps not fully accurately, that with the weapon he was using it was difficult to control how many shots fired. The evidence clearly supports the finding of all three of the aggravating factors found by the jury.

In compliance with Supreme Court Rule 28 § 3, a post sentence investigation report was completed and included in the record. Defendant was twenty-two years old at the time of the offense. Defendant did well in school but eventually dropped out of school in the tenth grade. He entered the military at age seventeen. He reportedly first met his accomplice in the instant offense, David Pennington, while in the service. Defendant had disciplinary problems in the service and was placed in a drug abuse treatment program prior to receiving an undesirable discharge in 1973. Following his discharge, defendant apparently remained in Louisiana working numerous jobs primarily as a laborer.

Defendant's criminal history consists of four prior arrests for nonviolent offenses, with a conviction for simple burglary. At the time of the instant offense defendant was on probation for his 1976 simple burglary conviction. Defendant has a history of drug abuse. Although defendant saw a psychiatrist while in the service, a psychiatric evaluation conducted for the uniform capital sentence report found defendant in good mental condition.

[19] The information contained in the sentence investigation report, along with other factors, is to be considered in this Court's determination of whether the death sentence in this case "is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

[20] Four cases of first degree murder charges in Jefferson Parish were provided for comparison with the present case.[8] None of these four cases resulted in the death penalty. However, none was as serious as the present case. While *State v. Marse*, 365 So.2d 1319 (La.1978) involved the shooting of a police officer, it was under circumstances warranting only a manslaughter conviction which the jury returned. In *State v. Love*, Jefferson No. 79-774, and *State v. Riggins*, Jefferson No. 77-1334, which resulted in first degree murder convictions and only life sentences, it appears that the defendants killed their victims during armed robberies. However, none of the other cases involved the killing of a police officer during an armed robbery while creating a risk of death or serious injury to several people. This case is distinguishable from the four cases provided for comparison as it is more serious in the aggravating circumstances involved. There are no mitigating factors here and the de-

8. This Court's rules (Rule 28) require the district attorney, in every case where the death penalty has been imposed, to file a list of each first degree murder case in the district in which the sentence was imposed after January 1, 1976 to enable this Court to review the imposed sentence for proportionality with other cases. This local comparison scheme has been upheld against constitutional attack notwithstanding a contrary view by at least one member of this Court. *See State v. Baldwin*, 388 So.2d 664 (La.1980), Justice Dennis concurring.

In any event, this defendant, considering the three aggravating circumstances attendant with this case and the fact that a death sentence has not heretofore been recommended in Jefferson Parish, would not likely be aided by comparison for proportionality somewhat rather than parishwide.

fendant himself testified that the armed robbery was his idea, not that of his accomplice. In view of the above, we do not find that the sentence imposed herein "is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Decree

For the reasons outlined above, the conviction and sentence of the defendant are affirmed.

AFFIRMED.

DENNIS, J., dissents with reasons.

BLANCHE, J., recused.

ON APPLICATION FOR REHEARING

PER CURIAM.

On application for rehearing we considered defendant's argument that the prosecutor's reference in closing argument to the fact that the capital sentencing statute requires the Supreme Court to review every death sentence constituted prosecutorial misconduct and reversible error.

[21] Any prosecutor who refers to appellate review of the death sentence treads dangerously in the area of reversible error. If the reference conveys the message that the jurors' awesome responsibility is lessened by the fact that their decision is not the final one, or if the reference contains inaccurate or misleading information, then the defendant has not had a *fair trial* in the sentencing phase, and the penalty should be vacated.

[22] But virtually every person of age eligible for jury service knows that death penalties are reviewed on appeal. There is no absolute prohibition against references to this fact of common knowledge, and this court should not impose an absolute prohibition, since such a reference does not necessarily serve to induce a juror to disregard his responsibility.[1] The issue should be determined in each individual case by viewing such a reference to appellate review in the context in which the remark was made.

[23] In the present case the prosecutor, in rebuttal during closing argument, reviewed in detail the capital sentencing statute. He discussed each aggravating circumstance listed in C.Cr.P. art. 905.4, pointing out the applicability or inapplicability to the present case, and then reviewed each mitigating circumstance listed in C.Cr.P. art. 905.5, pointing out that none had even been argued by the defense. Finally, conceding that this is not a "measuring contest", he stated that the presence of aggravating circumstances and absence of mitigating circumstances did not compel imposition of the death penalty, but that the enumerated circumstances were simply considerations listed by the Legislature to guide jurors in determining their recommendation.

Continuing his commentary on the fairness of the legislative scheme, the prosecutor stressed that the statute provided every possible safeguard against arbitrary imposition of death sentences, pointing out that the district attorney, the trial judge, the jury, and the Supreme Court must all agree that the death penalty is appropriate in the particular case.

Thus, the import of the closing argument was to tell the jury (1) that the statutory scheme, recognizing the seriousness of the consequences, provided adequate safeguards against arbitrary imposition of the death sentence, and (2) that weighing of all the considerations enumerated in the statute warranted imposition in this case. The argument did not serve to lessen the significance of the jury's role in the overall scheme.

1. Judicial restraint is particularly important in the area of absolute and inflexible prohibitions, since such rules are inconsistent with the very nature of the judicial process. Moreover, when an absolute prohibition is adopted, as the Legislature did in C.Cr.P. art. 770's prohibition against commenting on the defendant's failure to testify, the court must decide in each case whether the remark constitutes a prohibited comment. See, for example, *State v. Fullilove*, 389 So.2d 1382 (La.1980).

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BLANCHE, J., recused.

CALOGERO, J., would grant rehearing and assigns reasons.

FEDEROFF, J. Ad Hoc, would grant rehearing.

DENNIS, J., would grant rehearing for reasons assigned by him in his dissenting opinion and for reasons assigned by CALOGERO, J.

CALOGERO, Justice, dissenting to denial of rehearing.

I dissent from the majority's action refusing to grant a rehearing in this case.

The amicus rehearing application raises an issue not previously treated, that is, whether it was reversible error for the district attorney, in closing argument of the sentencing phase of the bifurcated trial, to tell the jury that the Louisiana Supreme Court will review, for excessiveness, a death penalty the jury should deem appropriate to impose. Although this issue was raised in the amicus brief on original hearing, it was not assigned as error or argued in defendant's brief, and was, therefore, not addressed originally. For the reasons which follow, I believe the issue raised is sufficiently important to warrant granting the rehearing to enable defendant to brief and argue the issue before the Court.

By virtue of the directive contained in C.Cr.P. art. 905.9,[1] as amended in 1976, this Court adopted Supreme Court Rule 28, § 1 which establishes the following review guidelines in cases where the death penalty is imposed:

> "Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:
>
> (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
>
> (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and
>
> (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Under these review guidelines, this Court is charged with the responsibility of reviewing the jury's recommendation to determine whether the sentence was influenced by any arbitrary factor. It is argued that the prosecutor's comments to the jury concerning appellate review of the case introduced an inappropriate and irrelevant consideration for a jury charged with determining the appropriate sentence to be imposed based on the facts of the case, and therefore, was an arbitrary factor which improperly influenced the jury verdict.

The following comment was made by the prosecutor, on rebuttal, in closing argument *of the sentencing phase of* defendant's trial:

> "There is another provision of the act which says that the Supreme Court of Louisiana shall review every sentencing of death to determine if it is excessive. Every possible safeguard where a defendant for whom the jury is decided, who the D.A. has decided, who the Judge has decided, who shall be sentenced to death shall go to the ultimate court of this state, and they will also determine, is that sentence excessive, was the jury vulnerous [sic] when they reached their verdict."

Although these remarks were immediately followed by the trial judge's charge to the jury on the law, the judge made no statement to the jury that the remarks should be disregarded, nor did he instruct the jury as to the precise law under which the Supreme Court reviews death sentences. The question for our determination is whether these comments by the prosecutor introduced an arbitrary factor into the jury's considerations which may have influenced the sentence imposed.

This question, the effect of informing the jury of appellate review of their verdict,

[1] C.Cr.P. art. 905.9 provides:

> "The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review."

has c been addressed by this Court on one p...r occasion, in *State v. Myles*, 389 So.2d 12 (La.1980). In *Myles*, the following comments were made by the prosecutor in his opening statement:

"Now, regardless of any verdict that you bring in, and if your verdict is subject to review, both as to guilt and as to sentence, by the Louisiana Supreme Court, this is only true in capital cases. It's the only case that the Louisiana Supreme Court can review the sentence as to whether it's correct or not. Of course, your verdict will also be subject to review in the United States Supreme Court. Therefore, although there's a heavy burden on you in a death sentence case, the burden is no heavier on you than it is on the prosecutor of the State of Louisiana or any of the other courts that have to review your verdict."

The majority, in an attempt to distinguish this case from similar cases in other jurisdictions which hold that such remarks are so prejudicial as to require reversal, held that the remarks here were not intended to encourage the jury to shirk its responsibility. The Court found that the statements were essentially correct, that the prosecutor did not indicate that the jury's determination was any less important because it would be reviewed, and the comments were merely "to express the shared responsibility of the components of the judicial system." Since *Myles* was reversed on rehearing the issue is unresolved jurisprudentially and a full examination of this important issue is in order.

The overwhelming consensus of cases from other jurisdictions is to the effect that "[c]omments by the prosecuting attorney in his argument to the jury on the power of the court to suspend sentence or to set the jury's verdict aside, or statements that a higher court has the power to review the finding of the jury on the weight of evidence, are calculated to induce the jury to disregard their responsibility, and are improper." 75 Am.Jur.2d § 250, p. 368. A contrary case, *People v. Ward*, 50 Cal.2d 702, 328 P.2d 777 (1958), held that although such re...rks may have been improper, they did not prejudice the defendant in that case.

In *People v. Ward*, supra, the prosecutor, in attempting to introduce some photographs into evidence stated, "not only is it material from the standpoint of identifying the body, of course, although we have the stipulation here, we have the appellate courts to go through whenever we have so--." At that point the prosecutor was interrupted by defense objection which was sustained. The court held that, under the facts of the particular case, defendant was not prejudiced by the remarks although they may have been improper. It should be noted, however, that this was a 1958 decision and prior to *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Of the other cases reviewed, all death cases and all post *Furman* except one, it was consistently held that comments about appellate review of the verdict constituted reversible error. In some cases the objectionable comments came during the sentencing phase of the bifurcated trial. *Fleming v. State*, 240 Ga. 142, 240 S.E.2d [illegible] (1977); *Hawes v. State*, 240 Ga. 327, [illegible] S.E.2d 630 (1977); *State v. Jones*, 298 N.[illegible] 495, 251 S.E.2d 425 (1979), in some cases they came during the regular trial in [illegible]ing arguments, *State v. Gilbert*, 258 S.E.2d 880 (S.C.1979), and in at least one case the comments came while the prosecutor was questioning prospective jurors, *People v. Johnson*, 284 N.Y. 182, 30 N.E.2d 465 (1940). One case concerned statements made by the prosecutor to the judge but they were made in the presence of the jury. *Prevatte v. State*, 214 S.E.2d 365 (1975). In all the above cases, the courts held that either informing the jury directly that their verdicts would be reviewed by an appellate court or making comment to that effect to the judge, in the jury's presence, was prejudicial and required reversal of the conviction and/or sentence.

In all the cases, the reason given for reversal was essentially the same, a general fear that such information has the effect of decreasing the responsibility the jury takes

the verdict.[2] In *Provatte v. State*, *supra*, the case cited most often as authority on this issue, the court held, "[A] reference by the prosecutor to the defendant's right to appeal is more likely to be considered reversible error if a death penalty is subsequently imposed, no doubt for the reason that, *in the weighing of imponderables it cannot be concluded that the jury were not influenced by such statements to impose some severe punishment than their unbiased judgment would have given.*" (Emphasis added.) In these cases, the courts have not looked to the intent of the prosecutor in making the statements, nor have they looked at the context in which they were made. Rather, they have simply held that because such statements tend to have the effect of diminishing the jury's sense of responsibility for their verdict, and because it is so difficult to know what influenced the jury in returning the verdict they return, when the death sentence is returned after such statements, reversal is required.

In *State v. Jones*, 296 N.C. 495, 251 S.E.2d 425 (1979), the court held that references to parole statutes, appeals, executive commutation or any other matters which are subsequent to the trial have no relevance with regard to the jury's task of weighing any aggravating and mitigating circumstances for the purpose of recommending a sentence, and introduce an arbitrary factor into the jury's considerations. While we have not imposed such an absolute prohibition,[3] I nevertheless believe this issue is sufficiently important to warrant granting the rehearing and giving defendant an opportunity to argue this issue before the Court before his death penalty is finally affirmed. For the foregoing reasons, I dissent from the *per curiam* denial of rehearing.

2. The following are excerpts from some of the cases:

"The inevitable effect of the prosecutor's remarks to the judge in the jury's presence was to encourage the jury to attach diminished consequence to their verdict, and to take less than full responsibility for their awesome task of determining life or death for the prisoners before them." *Provatte v. State*, *supra*. Such remarks "suggested to the jury that its responsibility for deciding appellant's fate was lessened. It was erroneous and extremely prejudicial for the solicitor to imply to the jury that her finality could be passed on to a higher court." *State v. Gilbert*, *supra*. "[R]emarks by a prosecutor about appellate safeguards suggest to the jury that it may pass the responsibility for a death sentence on to a higher court, and require reversal of the sentence. *State v. Tyner*, 268 S.E.2d 500 (S.C.1979). "Nothing can be permitted to weaken the jurors' sense of obligation to the performance of their duties." *People v. Johnson*, *supra*. "[R]emoving the jury of the existence of an appellate tribunal to which the case with which they were then charged might be carried up, if the evidence offered by the prisoner had been wrongfully withheld however well intentioned, was calculated, nevertheless, to lessen their sense of their own responsibility. Such statements constitute prejudicial error in cases in which a verdict of guilty exposes the accused to the death penalty." *Provatte v. State*, *supra*.

3. In *State v. Sumner*, 379 So.2d 1338 (La.1980) this Court looked at the effect of reading to the jury the law on parole or work release. While the Court reversed defendant's sentence, finding that the jury may have been misled because they were not given complete information, the Court did not take the position that such information was irrelevant to the jury's considerations. However, that argument was not raised in that case.

STATE of Louisiana

v.

Freddie J. GIBSON, Jr.

No. 66027.

Supreme Court of Louisiana.

Nov. 10, 1980.

Defendant was convicted before the Twenty Fourth Judicial District Court, Parish of Jefferson, Frank V. Zaccaria, J., of armed robbery, and he appealed. The Supreme Court, Dennis, J., held that: (1) seizure of defendant's jacket by police officials

APPENDIX "H"

DENIAL OF WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT TO REVIEW ITS AFFIRMANCE OF PETITIONER'S ORIGINAL CONVICTION AND SENTENCE. JUSTICE STEWART WOULD GRANT CERTIORARI, REPORTED IN 45 U.S.1010, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981)

(CONSISTING OF 1 PAGE NUMBERED 98)

APPENDIX "I"
STIPULATIONS
(CONSISTING OF 1 PAGE,
NUMBERED '00)

Stipulation #

FILED – October 25, 1978 Pete Fitzgerald

① That the defendant went to the Metairie Bank on the morning of 1-30-78 with the intent of committing an armed robbery.

② That after entering the Bank the defendant fired three shots, two of which struck and killed Dep. Robert Cochran.

③ That Dep. Cochran did fire one shot with service revolver which shot struck the defendant

④ A spent pellet was removed from the defendant and if Tech. Ron Singer would testify he would testify that the pellet recovered from the defendant was fired by Dep. Cochran's service revolver.

⑤ That the detective recovered a spent 9 mm pellet from the defendant's home in Baton Rouge and Tech. Singer would testify that this pellet was fired by the same pistol which fired the pellets recovered from Deputy Cochran's body.

[signature] AUSA

Fred A. Blancke III, Defense Counsel

Boren Federal Cmp

⑦

[redacted]